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United Nations Commission on International Trade Law

Forty-first session

Summary record of the 865th meeting
Held at Headquarters, New York, on Monday, 16 June 2008, at 10.30 a.m.

Temporary Chairperson: Mr. Michel (Under-Secretary-General for Legal Affairs, The Legal Counsel)
Chairperson: Mr. Illescas ..... (Spain)

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08-38254 (E)

The meeting was called to order at 10.55 a.m.

Opening of the session

1. **The Temporary Chairperson** declared open the forty-first session of the United Nations Commission on International Trade Law (UNCITRAL). He said that much of the work of the United Nations system rarely made headlines, yet that quiet work was an integral part of its objectives to promote higher standards of living, social progress and economic development. The Charter of the United Nations offered a framework of values that contributed to the emergence of a fair and inclusive global economy, and the Organization established global norms and standards to further develop those values. That standard-setting work had become ever more important in an era of globalization. The work of the Commission resulted in closer international ties and greater domestic economic stability, two essential conditions for international peace and human development.

2. The main item on the agenda for the forty-first session was the consideration of the draft convention on contracts for the international carriage of goods wholly or partly by sea, which was to be submitted to the General Assembly for adoption at its sixty-third session. Few industries were by nature as international as the transportation industry or therefore in greater need of modern, predictable and uniform rules to support its transactions. The draft convention was a comprehensive instrument that would make the law better suited to the current realities of commerce and would reduce the cost of transactions.

3. Commercial fraud, also on the agenda, posed a considerable obstacle to the growth of international trade. In addition to actual financial losses suffered by victims of fraud, fraudulent practices had a broader negative effect in that they undermined confidence in legitimate trade instruments. The Secretariat, at the Commission's request, had submitted a note setting out 23 indicators of commercial fraud, accompanied by illustrations and advice. The Commission might wish to publish those indicators for use by its secretariat in providing technical assistance, and by Governments and international organizations in their initiatives against fraud.

4. The Commission also had a role to play in the broad work of the United Nations to strengthen the rule of law. In accordance with General Assembly resolution 62/70, inviting comment on the role of the Commission in promoting the rule of law, it had taken an interest in seeing its work integrated into the Organization's broader efforts in that area. Through its work in the areas of arbitration and mediation, in particular, and its technical assistance programme, the Commission helped to build institutional capacities and mechanisms for effective enforcement. Effective commercial law played a supportive role in addressing root causes of many international problems, such as migration caused by impoverishment, inequality and internal conflicts, or inequitable access to shared resources, and constituted the foundation of regional and global economic integration. The promotion of arbitration, conciliation and mediation in the resolution of cross-border disputes was also helpful in preventing isolated disagreements from escalating into political conflicts. Modern rules on commercial law that enhanced transparency in international transactions were also useful in helping to prevent cross-border economic crimes and financing of terrorism.

5. The Commission would also consider its own methods of work at the session. The debate was timely, taking place after the increase in membership from 36 to 60 and the broadening of the spectrum of observers that might participate in its deliberations. Fine-tuning of its working methods and publication of its practices would facilitate the participation of members and observers and further strengthen its position as the leading global agency for rule formulation.

Election of officers

6. **Mr. Delebecque** (France), supported by **Mr. Sharma** (India), **Mr. Sato** (Japan), **Mr.** Ibrahima Khalil **Diallo** (Senegal), **Mr. Elsayed** (Egypt), **Mr. Lebedev** (Russian Federation) and **Mr. Hu** (China), nominated Mr. Rafael Illescas (Spain) for the office of Chairperson of the forty-first session of the Commission.

7. *Mr. Illescas (Spain) was elected Chairperson by acclamation.*

8. *Mr. Illescas (Spain) took the Chair.*

Adoption of the agenda (A/CN.9/644)

9. **Mr. Delebecque** (France) said that the agenda item entitled "Working methods of UNCITRAL" was of major importance and sought assurances that its

consideration would be given adequate time in the Commission's schedule.

10. **The Chairperson** said that, although a final programme of work had not yet been drawn up, that request would be taken into consideration.

11. *The agenda was adopted.*

Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea (A/CN.9/642, A/CN.9/645, A/CN.9/658 and Add.1-13)

12. **The Chairperson** drew attention to the text of the draft convention, which was contained in document A/CN.9/645. The text represented six years of work by the Working Group, which had spent a total of 180 working days on the draft within the past year.

13. As had been noted at the end of the Commission's fortieth session, the draft convention constituted no more than a proposal, notwithstanding the long and intensive discussions within Working Group III (Transport Law). The Working Groups were subsidiary bodies of the Commission, which had sovereign power to review their proposals, as was its consistent practice. Its method of review would be consensus-based, like the work of the Working Group itself, which had produced a text that reflected the prevalent views of its members.

14. He expressed appreciation for the input of non-governmental observers and hoped that they would continue to allow the Commission to benefit from their valuable experience. However, in the interest of completing the Commission's work at the current session, their views would not be taken into account in the finalization of the draft.

15. The draft instrument had much to recommend it and was already serving as a benchmark for regional instruments. However, the existence of such regional agreements might complicate the universal implementation of the draft convention, once approved, and that was a further factor that should encourage the Commission to conclude its work during the current session.

16. Turning to the text of the draft convention, he proposed that draft article 1, which set out definitions of important terms used therein, should not be discussed in a void but rather should be referred to, as appropriate, in the course of reviewing the subsequent articles. He invited members of the Commission to make general comments before undertaking an article-by-article analysis.

17. **Mr. Elsayed** (Egypt) said that his delegation, which was currently chairing the League of Arab States, had made a careful study of the draft convention. It had found some overlapping in the definitions, some aspects that had not been addressed, and some articles that needed to be corrected. A leading concern should be to ensure a balance between the parties involved in maritime transport and to provide clearly for the responsibility and accountability of carriers.

18. **Mr.** Ibrahima Khalil **Diallo** (Senegal) said that Senegal along with other African countries had actively participated in the work of the Working Group and was happy to see many of its positions reflected in the draft. While it was not satisfied with some of its parts, it was prepared to set aside its reservations in the interest of consensus.

19. **Mr. Blake-Lawson** (United Kingdom) said that the United Kingdom's comments on the draft (A/CN.9/658/Add.13) might not have been seen, owing to their tardy submission, and he invited delegations to read them. His delegation generally supported the draft text, which would contribute to the greater harmonization of international law, but in the interests of strengthening legal certainty it had put forward proposals concerning the definition of "contract of carriage" and chapters 9 and 11.

20. **Mr. Baghaei Hamameh** (Islamic Republic of Iran) said that his delegation was generally supportive of the draft convention. In keeping with its core mandate, the Commission should regulate the rules governing international carriage of goods by sea with a view to facilitating international trade and to ensuring a balance between the interests of the carriers, shippers and third parties concerned. While the draft convention, upon its adoption, would help to settle potential disputes between them, it should not supersede general principles of international law in such areas as maritime safety and protection of the marine environment. Draft article 18, paragraph 5 (a), which did not duly take into account the work done by the International Maritime Organization, could well undermine the safety of shipping, particularly when compared with the more effective legal regime of presumed fault. Moreover, the Commission should

exercise caution in determining carriers' liability, which, in view of its possible effects on commercial shipping activities and the conditions of the insurance market, should be increased as little as possible. The necessary revisions should be made to the draft instrument before its adoption, so as to increase the chances of its being ratified by a large number of States, particularly developing countries.

21. **Mr. Tsantzalos** (Greece) expressed broad support for the draft convention, pointing out that lack of uniformity in international trade law impaired legal and commercial certainty and could therefore militate against international trade.

22. **Ms. Carlson** (United States of America) said that her delegation strongly supported the current text of the draft convention, which had been agreed upon by Working Group III (Transport Law) as a result of painstaking compromises negotiated over a period of six years. While certain amendments to the present text were inevitable, it was important to bear in mind that the wording represented a delicate balance of interests: a change to any part of the text might have wider implications for the text as a whole, even threatening the widespread ratification of the draft convention itself. The current text should therefore be approved in substantially the same form as that approved by the Working Group.

23. **Mr. Sharma** (India) recalled that the current text of the draft convention was the result of hard-won efforts to achieve consensus on a number of issues over a six-year period. Consequently, while small corrections to clarify parts of the text could prove helpful, great care must be taken not to undermine the consensus that had already been achieved. Indeed, all the possible scenarios with respect to the more contentious issues, such as the limitation of liability, had already been discussed in detail, and the definitive positions had been set down in the current text. The draft convention should therefore be adopted substantially in its current form.

24. **The Chairperson** said he took it that the Commission wished to consider the draft convention article by article, together with the related definitions in each case.

25. *It was so decided.*

Draft article 2 (Interpretation of this Convention)

26. *Draft article 2 was approved in substance and referred to the drafting group.*

Draft article 3 (Form requirements) and the definition of "electronic communication"

27. **Mr. Sato** (Japan) suggested that references to draft article 24, paragraph 4, draft article 69, paragraph 2, and draft article 77, paragraph 4, should be included in the text of draft article 3.

28. **Mr. Miller** (United States of America), supported by **Mr. Fernández** (Spain) and **Mr. Zunarelli** (Italy), expressed support for the proposal of the delegation of Japan.

29. **The Chairperson** said he took it that references to draft article 24, paragraph 4, draft article 69, paragraph 2, and draft article 77, paragraph 4, should be included in the text of draft article 3.

30. *It was so decided.*

31. **Mr. Oyarzábal** (Observer for Argentina) asked whether the definition of "electronic communication" in draft article 1, paragraph 17, should include the requirement that it identified the originator, in line with corresponding definitions in the UNCITRAL Model Law on Electronic Signatures and the UNCITRAL Model Law on Electronic Commerce.

32. **Mr. Sekolec** (Secretary of the Commission) pointed out that a clear distinction was drawn in UNCITRAL instruments on electronic commerce between the definition of "data message", analogous to "electronic communication" in the draft convention, and the definition of "electronic signature". The experts of Working Group III (Transport Law) and Working Group IV (Electronic Commerce) had agreed in their consultations that attributing authorship of a communication to a person was a function of the signature rather than of the communication itself. Consequently, reference to the originator of the communication had deliberately been omitted in the present definition of "electronic communication", since identifying the originator was a function of the signature.

33. *Draft article 3 and draft article 1, paragraph 17, were approved in substance and referred to the drafting group.*

Draft article 4 (Applicability of defences and limits of liability)

34. *Draft article 4 was approved in substance and referred to the drafting group.*

Draft article 5 (General scope of application) and the definitions of "contract of carriage", "carrier" and "shipper"

35. **Ms. Czerwenka** (Germany) expressed her delegation's serious concerns about the broad scope of the draft convention and, in particular, the establishment of special rules applying to multimodal transport contracts that provided for carriage by sea, which would lead to a fragmentation of the laws on multimodal transport contracts. To avoid that outcome, her delegation wished to see the draft convention applied solely to maritime transport contracts. In that connection, she also noted that her delegation would raise substantive concerns with respect to draft article 27 at the appropriate juncture.

36. **Mr. Blake-Lawson** (United Kingdom) said that his delegation shared many of the concerns expressed by the delegation of Germany and had particular concerns related to the definition of "contract of carriage", as set out in draft article 1, paragraph 1. Under the current definition, it was essential to the application of the draft convention that the contract, either expressly or by implication, should provide for the goods to be carried by sea. However, many contracts, for good commercial reasons, allowed the means of transport to be left entirely or partially open. Thus, if a contract was not "mode specific", it might appear that the draft convention would not apply, unless a requirement for carriage by sea could be implied.

37. Proposals had been made at various stages to add some words to the definition to indicate that a contract permitting carriage by sea would be deemed a contract of carriage for the purposes of the draft convention in cases where the goods were in fact carried by sea. Nevertheless, those proposals had so far been rejected. His delegation was of the view that even without such words the draft convention would apply to goods carried wholly or partly by sea, where the contract permitted such carriage. However, the draft convention was not clear on that point.

38. The present unsatisfactory situation led to the distinct possibility that, once the draft convention was adopted, it would have a partial and uncertain field of application. That likelihood was increased by the requirement in draft article 5 that, according to the contract of carriage, the place of receipt, the port of loading, the place of delivery or the port of discharge must be located in a contracting State. It followed that, if neither the place of receipt nor the place of delivery was in a contracting State, and no port of loading or port of discharge was specified in the contract, the draft convention might not apply, even though the actual ports of loading and discharge were in fact in contracting States.

39. Prior to the approval of the draft convention by the Commission, the definition of "contract of carriage" and the terms of draft article 5 should therefore be clearly amended to bring within the scope of the draft convention all carriage by sea where the actual port of loading or the actual port of discharge was in a contracting State. Such an amendment should also entitle a court to have due regard not only to the contract of carriage, but also to how the goods were in fact carried.

40. **Mr. Elsayed** (Egypt) said that that draft article 5 should not begin with the phrase "Subject to article 6".

41. **Ms. Downing** (Australia) said that the alternate text proposed by her delegation in its written comments (A/CN.9/658, para. 18) would clarify the scope of application and address some of the concerns expressed by the representatives of the United Kingdom and Germany.

42. **Mr. Miller** (United States of America) said that it was important to recall the significant efforts made by the Working Group over many weeks in formulating the draft convention, which the Commission would have only nine days to review in its entirety. The German proposal to eliminate the "maritime plus" aspect of the draft convention would undo five of the six years of the Working Group's work. Not only had it been agreed upon at an early stage that the draft convention would be a "maritime plus" convention, but also the "maritime plus" approach was best suited to the manner in which the business community operated. It would be unwise for the Commission to impose another type of legal regime on the business community's operations or to reopen such a fundamental question without strong justification.

43. The United Kingdom's proposal had been carefully considered and ultimately rejected in the

Working Group, which had assumed that most courts would understand that an implied modification of the contract would result if the contract permitted the carriage of goods by sea and the goods were in fact carried by sea. Whether the Working Group's assumption was correct would be determined once the courts began reviewing relevant cases. His delegation would prefer that draft article 1, paragraph 1, should remain unchanged.

44. **Mr. Mayer** (Switzerland) expressed his delegation's support for the statement made by the representative of the United States.

45. **Mr. Sato** (Japan) also endorsed the statement made by the representative of the United States. Although his delegation shared the United Kingdom's concern to some extent, the matter had already been debated at length at the Working Group's fifteenth session, and the discussion was covered in its report (A/CN.9/576, para. 33). If there was an option under the contract of carriage to choose a port of loading or discharge within a contracting State, the convention would apply. The prevailing view in the Working Group was that an explicit provision for that practice was unnecessary and potentially misleading.

46. The issue of modality in the contract of carriage, raised by the German delegation, was dealt with in articles 27 and 84 and could be resolved during the discussion of those articles.

47. **Mr. Zunarelli** (Italy) said that his delegation agreed with the views expressed by the representative of the United States and supported by the representatives of Switzerland and Japan. The Working Group had held its discussions on the assumption that the "maritime plus" approach had been adopted; therefore, it should not be changed.

48. **Mr. Romero-Naser** (Honduras) said that the authorities in several States members of the Commission had taken note of the specific advances made and that the Commission should not undo those advances. His delegation encouraged all Commission members to support the statement made by the United States.

49. **Mr. Delebecque** (France), echoing the sentiments expressed by the delegations of the United States, Italy and Japan, said that his delegation did not wish to reopen the discussion of the definition of "contract of carriage", which had been debated at length and was perfectly acceptable in its present form. The formulation "shall provide for carriage by sea" was flexible enough to cover many transport operations and it broadly defined the scope of application. Technical questions that the Commission did not consider to be essential should be addressed by the courts.

50. **Mr. Ndzibe** (Gabon) said that his delegation was hesitant about the German delegation's proposal to restrict the draft convention's scope of application. In its current form, the scope of application was much broader and covered pre- and post-delivery. His delegation supported the position expressed by the delegations of the United States and France.

51. **Mr. Elsayed** (Egypt) said with reference to the definitions in draft article 1, paragraphs 5 and 8, that he understood the term "carrier" to mean the person who pledged to carry the goods from one place to another in return for a fee, as one of the two parties to the contract and the term "shipper" to mean the person who delivered the goods to the carrier, transported the goods from one place to another and concluded the contract of carriage.

52. **The Chairperson** said he took it that the majority of the Commission members wished draft article 5 and the definitions of "contract of carriage", "carrier" and "shipper" set out in draft article 1, paragraphs 1, 5 and 8, to remain unchanged.

53. *Draft article 5 and draft article 1, paragraphs 1, 5 and 8, were approved in substance and referred to the drafting group.*

The meeting rose at 1 p.m.

United Nations A/CN.9/SR.866

General Assembly

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United Nations Commission on International Trade Law

Forty-first session

Summary record of the 866th meeting
Held at Headquarters, New York, on Monday, 16 June 2008, at 3 p.m.

Chairperson: Mr. Illescas ..... (Spain)

Contents

Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea (*continued*)

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08-38260 (E)

The meeting was called to order at 3.15 p.m.

Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea (*continued*) (A/CN.9/642, A/CN.9/645 and A/CN.9/658 and Add.1-13)

Draft article 6 (Specific exclusions) and definitions of "liner transportation" and "non-liner transportation"

1. **The Chairperson** noted that the definitions of "liner transportation" and "non-liner transportation" contained in draft article 1, paragraphs 3 and 4, were relevant to the content of draft article 6. He took it that the Commission wished to retain the current wording of the draft article and the related definitions.

2. *Draft article 6 and draft article 1, paragraphs 3 and 4, were approved in substance and referred to the drafting group.*

Draft article 7 (Application to certain parties) and definitions of "holder" and "consignee"

3. **The Chairperson** noted that the definitions of "holder" and "consignee" in article 1, paragraphs 10 and 11, were related to the content of draft article 7. He took it that the Commission wished to retain the current wording of the definitions as well as the draft article.

4. *Draft article 7 and draft article 1, paragraphs 10 and 11, were approved in substance and referred to the drafting group.*

Draft article 82 (Special rules for volume contracts) and the definition of "volume contract"

5. **The Chairperson** suggested that the Commission should proceed to discuss draft article 82 out of numerical order, in order to complete consideration of the provisions relating to the scope of application of the draft convention. He noted that the definition of "volume contract" contained in article 1, paragraph 2, was related to the content of draft article 82.

6. **Ms. Downing** (Australia) said that her delegation had consistently opposed the wording of draft article 82 and the policy behind it, both in debate and in writing (A/CN.9/658, paras. 11-15 and 66-67, and A/CN.9/WG.III/WP.88, annex). The draft convention was intended to harmonize the law on the carriage of goods by sea; that aim would be undermined by draft article 82, since even its proponents anticipated that the volume contract provisions would apply to as much as 70 per cent of the container trade.

7. Moreover, the ultimate test of the convention would be whether it struck a fair balance between the commercial parties, and draft article 82 failed that test. There were good public policy reasons for Governments and international law in general to provide protection for the weaker party. All other international conventions dealing with the transport of goods offered such protection, for example, by providing for mandatory but capped liability. Draft article 82, however, allowed for an unprecedented amount of freedom of contract, bringing with it the possibility of abuse of the weaker bargaining party, generally, though not always, the shipper. Her delegation was dissatisfied with the text in its current form and continued to advocate the drafting changes proposed in its written comments (A/CN.9/658, paras. 14 and 67).

8. **Mr. Elsayed** (Egypt) said that his delegation supported the statement by the representative of Australia.

9. **Ms. Talbot** (Observer for New Zealand) expressed her delegation's agreement with the statement of Australia and drew attention to her country's written comments on the definition of "volume contract" (A/CN.9/658/Add.2, paras. 4-6).

10. **Mr. Schelin** (Observer for Sweden) said that his delegation supported the provision as it stood, believing that it provided adequate protection for the shipper. To link the issue of freedom of contract to a specified number of containers or shipments would result in a lack of flexibility.

11. **Mr. Oyarzábal** (Observer for Argentina) said that his delegation supported the Australian position that draft article 82 as currently worded was unacceptable, because it provided inadequate protection for shippers in small countries. Although under draft article 92 no reservation to the convention was permitted, one solution to the impasse, if positions were inflexible, might be to allow States to formulate a reservation specifically to draft article 82.

12. **Ms. Chatman** (Canada) said that her delegation supported the Australian position and had been consistently concerned about draft article 82 and an overly broad definition of "volume contract".

13. **Ms. Czerwenka** (Germany) said that, although her delegation was not totally opposed to allowing freedom of contract in certain circumstances, it was concerned, as it had stated in its written comments (A/CN.9/658/Add.11, para. 21), that the definition of "volume contract" in draft article 1, paragraph 2, was too vague to enable a judge to decide whether draft article 82 applied in a given case.

14. **Mr. Miller** (United States of America) said that, although the United States had many shippers, his delegation was interested in striking a good balance between shipper and carrier interests. It believed that the current draft met the concerns expressed. In Working Group III (Transport Law), more than 30 delegations,[1] including some that had originally opposed the provision, had supported the final draft as part of a compromise package.

15. **Mr. Hu** Zhengliang (China) said that his delegation had repeatedly expressed its dissatisfaction with draft article 82, in part because of the insufficient protection provided for small shippers. Moreover, the definition of "volume contract" was so broad that it could cover, for example, an arrangement for the shipment of three containers over the course of three voyages. It was practicable for the draft convention to allow derogation, but freedom of contract should be based on equality of bargaining power, which was often not the case in reality.

16. **Ms. Slettemoen** (Norway) said that her delegation preferred to retain the current text of the draft article and the definition of "volume contract".

17. **Mr. Delebecque** (France) said that, although the provision had been controversial from the start, his delegation found the compromise reached in the Working Group acceptable, even if not perfect, and advocated retaining the current wording of draft article 82.

18. **Mr. Cheong** Hae-yong (Republic of Korea) said that his Government had organized several meetings with national industries and maritime law experts on the issue of volume contracts. In the light of their opinions, his delegation advocated a more cautious approach towards volume contracts in order to protect small shippers and carriers from undue pressure from large carriers and shippers. If the draft convention allowed freedom of contract with regard to volume contracts, a large shipper could, for example, impose an absolute liability clause on a carrier with weaker bargaining power, depriving it of the protection of the liability limits under the Hague-Visby Rules. To maximize the carrier's liability while reducing the amount of cargo constituting a volume contract would only benefit the shipper. Even if public policy in a given jurisdiction disallowed a contract unfairly detrimental to the carrier in that respect, once the convention was signed, the national courts could no longer regard such a contract as unlawful. Moreover, the volume contract provisions undermined the uniformity and predictability of commercial law aimed at by the draft convention. His delegation agreed with the representatives of Australia, Canada and China that the definition of "volume contract" should include a threshold figure.

19. **Mr. Zunarelli** (Italy) said that he associated himself with the views expressed by the representative of France; the subject had been discussed extensively and he was satisfied with the compromise reached in Vienna.

20. **Ms. Eriksson** (Observer for Finland) said that the draft article had been studied by her national authorities, who believed that the current wording had sufficient safeguards to ensure equitable treatment for both parties to a contract; she would prefer to leave it unchanged.

21. **Ms. Peer** (Austria) said that while she would prefer not to change the wording of draft article 82, she could support efforts to clarify the definition of "volume contracts" in draft article 1, paragraph 2, as proposed by the representatives of Australia and Germany.

22. **Mr. Sato** (Japan) said that he agreed with the representatives of Finland and France; draft article 82, particularly with the recent addition of paragraphs 2 (c) and (d), gave shippers adequate protection. Any effort to clarify the definition of "volume contract" would be controversial. To set specific parameters would make the definition inflexible and it was unlikely that agreement on an amount would be reached; wording

[1] Angola, Benin, Brazil, Burkina Faso, Cameroon, Congo, Côte d'Ivoire, Democratic Republic of the Congo, Denmark, El Salvador, Equatorial Guinea, France, Gabon, Ghana, Guinea, Guinea-Bissau, Italy, Mauritania, Namibia, Niger, Nigeria, Norway, Poland, Senegal, Slovenia, South Africa, Spain, Switzerland, Thailand, Togo, United Kingdom, United States of America and Venezuela (Bolivarian Republic of).

such as "substantial volume" would be even vaguer than the current text.

23. **Mr. Mayer** (Switzerland) said that he associated himself with the statements made by the representatives of, inter alia, France and the United States of America.

24. **Mr. Lebedev** (Russian Federation) said that while he was prepared to consider any proposals for a new definition of "volume contracts", he saw little hope of a solution acceptable to all members of the Commission. Draft article 82 was important for traders, shippers and other parties, especially in the context of container shipping. It also suggested the manner in which the convention, once adopted, would be applied in the future. By including the reference to "greater or lesser rights, obligations and liabilities" in paragraph 1, the drafters had sought to ensure that if a future case involving abuses by a shipper or carrier came before the courts, the presumption would be that the purpose of the convention was to prevent arbitrary increases or decreases in liability.

25. The Commission had approved in substance draft article 2 (Interpretation of this Convention), which stressed "the need to promote uniformity in its application and the observance of good faith in international trade". That statement was intended to provide guidance for the courts in cases embodying the concerns raised by the representative of Australia. In the absence of a clear proposal for a new definition of "volume contracts", he would prefer to leave draft article 1, paragraph 2, and draft article 82 unchanged.

26. **Mr.** Ibrahima Khalil **Diallo** (Senegal) said that draft article 82 was of great interest to the States of his region. Its current wording reflected the concerns expressed by delegations and he saw no reason to return to that sensitive issue; the text was acceptable as it stood.

27. **Mr. Bigot** (Observer for Côte d'Ivoire) said that he associated himself with the views expressed by the representative of Senegal.

28. **The Chairperson** said it was clear that the proposed amendments to the draft article did not have the support of the majority of delegations.

29. *Draft article 82 and draft article 1, paragraph 2, were approved in substance and referred to the drafting group.*

Draft article 8 (Use and effect of electronic transport records)

30. **The Chairperson** said that the definitions contained in draft article 1, paragraphs 14 to 16 and 18 to 22 all related to chapter 3 (Electronic transport records); however, he suggested that the Commission should begin by considering draft articles 8, 9 and 10 and then discuss the definition of "electronic transport record" contained in draft article 1, paragraph 18, leaving the other definitions to be considered in connection with the draft articles in chapter 8 (Transport documents and electronic transport records).

31. *It was so decided.*

32. *Draft article 8 was approved in substance and referred to the drafting group.*

Draft articles 9 (Procedures for use of negotiable electronic transport records) and 10 (Replacement of negotiable transport document or negotiable electronic transport record)

33. *Draft articles 9 and 10 were approved in substance and referred to the drafting group.*

Definition of "electronic transport document"

34. *Draft article 1, paragraph 18, was approved in substance and referred to the drafting group.*

Draft article 11 (Carriage and delivery of the goods)

35. *Draft article 11 was approved in substance and referred to the drafting group.*

Draft article 12 (Period of responsibility of the carrier)

36. **Ms. Czerwenka** (Germany) drew attention to paragraph 7 of her delegation's comments on the draft convention (A/CN.9/658/Add.11), which contained proposed amendments to draft article 12, paragraph 3 (a) and (b). Those subparagraphs, in their current form, gave the impression that the parties to a contract of carriage could exclude the liability of the carrier if the goods were received prior to the time of their initial loading under that contract. Her delegation believed that the carrier should be liable from the point at which the goods were received and should not be able to escape liability by redefining the period of responsibility.

37. **Mr. Tsantzalos** (Greece) said that his delegation considered that the words "on the ship" should be added after "loading" and "unloading" in draft article 12, paragraph 3 (a) and (b), respectively, in order to prevent the carrier from contracting out of the minimum period of responsibility between the time that the goods were loaded onto the ship and the time of their unloading.

38. **Mr. Morán Bovio** (Spain) pointed out that the Spanish text of draft article 12, paragraph 3, contained the words "sin perjuicio de lo dispuesto en el párrafo 2", whereas the reference to paragraph 2 had been deleted from the other language versions.

39. He did not think that the majority of delegations were in favour of the amendments proposed by the representative of Germany; the current wording conveyed the drafters' intent and should be left unchanged.

40. **Ms. Downing** (Australia) drew attention to her delegation's comments on the draft convention (A/CN.9/658, paras. 20-21), in which it had expressed the concern that draft article 12, paragraph 3, might enable carriers to confine their responsibility to the tackle-to-tackle period, thereby affording shippers less protection than existing Australian law. Her delegation would prefer to delete the paragraph entirely but could accept the amendment proposed by the representative of Germany.

41. **Mr. Blake-Lawson** (United Kingdom), supporting the German proposal, said that draft article 12 in its current form did not take sufficient account of the fact that receipt and delivery, or even possession, were concepts rather than occurrences like loading and discharging. The responsibility of the sea carrier did not necessarily start with loading nor end with discharge. It was the carrier's assumption of effective control of the goods that was crucial. What draft article 12, paragraph 3, aimed to do was to prevent contractual devices that would artificially deny that the carrier had assumed effective control of the goods.

42. The current text also did not take account of a situation where the consignee, contrary to draft article 45, chose not to take such effective control by refusing to accept delivery. His delegation believed that the German amendment better served the principle underlying paragraph 3 and also shared Germany's concerns in respect of draft article 20.

43. **Mr. Elsayed** (Egypt) said that, as it stood, paragraph 3 was unacceptable because it was open to differing interpretations and because it took into account only the obligations of the carrier, without considering the possible responsibilities of a third party under a prior contract concluded between the two.

44. **Mr. van der Ziel** (Observer for the Netherlands) said that he found draft article 12, paragraph 3, quite acceptable. The intention was to retain in the draft convention the established Hague-Visby Rule that the carrier was liable for loss of and damage to goods during the tackle-to-tackle period. Thus, paragraph 3 (a) said that the time of receipt of goods, while negotiable, must not be subsequent to the beginning of loading — in other words, the moment when the goods had been hooked on to the tackle — and that the time of delivery could not be stipulated to be prior to the completion of unloading. He disagreed with the German delegation that the provisions of paragraph 3 were incorrect.

45. Since the draft convention applied to both multimodel and port-to-port shipment, the text referred to "initial loading" and "final unloading", which in the case of port-to-port shipment automatically meant on and from the ship. The additional wording suggested by Greece was therefore unnecessary.

46. **Ms. Chatman** (Canada) proposed that paragraph 3 should either be deleted or replaced by the German proposal.

47. **Mr. Miller** (United States of America) said that he largely agreed with the Netherlands. The draft convention should facilitate whatever the industry was doing and should therefore cover the whole range of possibilities, from tackle-to-tackle responsibility to port-to-port or door-to-port. The purpose of draft article 12, paragraph 3, was to ensure that abuses did not occur; and yet the very delegations most concerned about the possible abuses were the ones arguing against it. The German proposal was not a clarification but a complete reopening of discussion on one of the fundamental provisions determining the kind of convention that would be produced. His delegation believed that the Commission should defer to the Working Group, which had spent so much time to produce the acceptable compromise text that was before it.

48. **Mr. Sato** (Japan) observed that his delegation's reading of draft article 12, paragraph 3, was similar to that of the United States. The intention was to ensure

that, while it prohibited agreement on a period of responsibility shorter than from tackle-to-tackle, the agreed period could also be broader, including port-to-port or even door-to-door. The German proposal subverted the provision and totally changed its nature.

49. **Ms. Czerwenka** (Germany) said that her delegation's proposal was not intended to change the nature of paragraph 3, which it interpreted along the lines of the proposed amendment, namely, as not intending to revert to the Hague-Visby tackle-to-tackle rule but rather as following the Hamburg Rules approach under the United Nations Convention on the Carriage of Goods by Sea. She herself felt that there was a major difference between the Hague-Visby Rules and draft article 12, paragraph 3, which contained a provision that would allow the carrier to exclude liability even while in physical possession of the goods. If, as the Netherlands had contended, the intention of the text was to retain the tackle-to-tackle principle, that should be handled as it had been in the Hague-Visby Rules, namely, by leaving it to national legislation to regulate freedom of contract to exclude liability outside the tackle-to-tackle period.

50. Moreover, in draft article 20, the draft convention developed a totally new concept, equating the position of the maritime performing party to that of the contract carrier and making them both liable to the same extent. That meant that, for the purposes of draft article 12, paragraph 3, if the contracting carrier could exclude responsibility for damages in port, then no one would be liable for what happened in port; whereas under the Hague-Visby Rules, at least one party remained liable.

51. If in paragraph 3 the tackle-to-tackle principle was to be replaced by the broader principle of the period of responsibility, it must be made clear that once the carrier had taken possession of goods on land or in a transport vehicle in the port area, the carrier's responsibility started and the carrier could not seek exemption via a definition of the period of responsibility.

The meeting was suspended at 4.55 p.m. and resumed at 5.15 p.m.

52. **Ms. Mbeng** (Cameroon) supported the gist of the German proposal and agreed that the current wording of draft article 12, paragraph 3, did not reflect its purpose. It would be unfortunate to revert to the Hague-Visby approach in defining the period of responsibility.

53. **Mr. Zunarelli** (Italy) observed that the current text was a clear improvement over Hague-Visby. He disagreed with the reading of the German and other delegations: the text did not allow the carrier to limit the period of responsibility, but, simply for the protection of the shipper, allowed the parties to agree that the time and location of receipt and delivery could differ from the time when a person other than the carrier received the goods, as long as it was after initial loading or prior to final unloading. Under no circumstances could the carrier deny liability after having already received the goods. The carrier could only declare that another person who had received them had done so on behalf of the shipper. Under the current text, the carrier would also still be liable if it warehoused the goods.

54. **Mr. Delebecque** (France) observed that if past proposals to define delivery in material rather than legal terms — for example, as effective transfer or effective placing at disposal — had been adopted, there would now be no problems. Paragraph 3 (b) sought to protect consignees against abuses. France had protective legislation to the effect that a tackle-to-tackle clause would apply only once the goods had effectively been placed at the disposal of the consignee, but other countries might not have such legislation, and that made their concerns understandable.

55. **Mr. Miller** (United States of America) thanked the German delegation for explaining the rationale behind its proposal, but said that his delegation read the current text very differently. The carrier's period of responsibility would be stipulated in the contract of carriage; if the carrier assumed functions outside the scope of the convention, its liability would be determined by other national rules and regimes, which often entailed an even higher degree of responsibility. Persons other than the carrier in possession of the goods were covered as appropriate under national laws. It would be unwise to try in the draft convention to impose rules on the carrier when it was acting in a capacity other than as a provider of carriage. Therefore, Germany's concerns were needless.

56. **Mr. Alba Fernández** (Spain) said that the inclusion in draft article 12, paragraph 3 (a) and (b), of a reference to the persons referred to in article 19 would obscure rather than clarify the issue, since it would distract the reader and could create problems in specific practical instances in the future. In his

delegation's view, draft article 12, paragraph 3, was sufficiently clear as to the carrier's responsibility for the goods and should therefore be left as it was.

57. **Mr. Schelin** (Observer for Sweden) pointed out that draft article 12, paragraph 3, could be interpreted in two different ways. On the one hand, it could be understood to mean that the carrier's liability began when he received the goods and ended when the goods were delivered; paragraph 3 simply prevented the contract of carriage from providing a time of receipt subsequent to the beginning of the initial loading or a time of delivery prior to the completion of the final unloading. On the other hand, it could be construed as the old tackle-to-tackle principle, according to which a carrier could avoid liability by denying responsibility for the goods during their warehousing, either before their receipt or after their delivery. Sweden subscribed to the first interpretation and considered paragraph 3 to be a mere clarification; other delegations, however, seemed to interpret the provision differently. The current wording, though ambiguous, could not be easily changed; his delegation therefore accepted draft article 12, paragraph 3, as it stood.

58. **Mr. Cheong** Hae-yong (Republic of Korea) said that his delegation, too, supported the current version of draft article 12, paragraph 3.

59. **Ms. Czerwenka** (Germany) expressed appreciation for the Swedish delegation's explanation. She disagreed with the representative of Spain that the meaning of paragraph 3 was clear; it seemed to be clear to different delegations in different ways. That was why it would be helpful to find a way of clarifying the provision, perhaps in informal consultations; first, though, she would need some instruction as to the exact meaning of paragraph 3. Her delegation could accept the Italian interpretation, as endorsed by Sweden. If that interpretation was supported by the Working Group, she was open to making the provision itself more precise or, at least, to making its meaning clear in the report of the current session. To end the discussion in dissent would be extremely unfortunate.

60. **Ms. Slettemoen** (Norway) said that her delegation interpreted paragraph 3 as Sweden did.

61. **Mr. Sato** (Japan) wondered whether a clarification to the effect that nothing in paragraph 3 prevented a contracting State from introducing mandatory regulations covering the period before loading and after discharge would address the concerns raised by Germany.

62. **The Chairperson** asked the representative of Japan whether he wished that clarification to be included in the report of the session or in the text of the draft convention.

63. **Mr. Sato** (Japan) said that he had been referring to the report. However, if other delegations wished to include a clarification in the draft convention itself, his delegation would consider that possibility.

64. **Mr. Miller** (United States of America) said that, if the Japanese representative meant that nothing in the draft convention prevented a contracting State from introducing mandatory regulations covering the period before the carrier's period of responsibility began, which could be at loading, and after the carrier's period of responsibility ended, which could be at discharge but for a door-to-door or port-to-port shipment would be at those respective points, his delegation had no objection to including such a clarification in the report of the session.

65. **Mr. Sato** (Japan) confirmed that that was what he had meant.

66. **Mr. van der Ziel** (Observer for the Netherlands) said that he was somewhat confused. Surely it was obvious that the period before loading and after unloading could be regulated by national legislation. He agreed with the representative of Germany that the text as it stood was ambiguous; every effort must be made to remove that ambiguity. The differences of opinion did not seem all that far apart to him.

67. **Mr. Morán Bovio** (Spain) endorsed the comment made by the representative of the Netherlands. It was not clear to him why they were discussing issues that fell under national law and were therefore outside the scope of the draft convention.

68. **Mr. Zunarelli** (Italy) proposed retaining the current wording of paragraph 3, minus the phrase "for the purposes of determining the carrier's period of responsibility", and placing it directly after, or even making it part of, paragraph 1. It would then be clear that paragraph 3 did not derogate from the general provision stated in paragraph 1, but simply placed limitations on the parties at the time of drawing up the contract of carriage.

69. **Mr. Alba Fernández** (Spain) proposed placing paragraph 3 directly after paragraph 1 and adding an introductory phrase along the lines of "without prejudice to paragraph 1". The minor change proposed by the representative of Italy could be the solution.

70. **Ms. Eriksson** (Observer for Finland) supported by **Mr. Miller** (United States of America) and **Mr. Hu** Zhengliang (China), suggested that a smaller group should consider the issue in informal consultations. She hoped that a solution would be found so as to remove the current ambiguity for future generations.

71. **The Chairperson** said he took it that the Commission wished to leave the issue open and hold informal consultations.

72. *It was so decided.*

Draft article 13 (Transport beyond the scope of the contract of carriage)

73. **Mr. Elsayed** (Egypt) said that he failed to understand how the Commission could allow a carrier to issue a document that included transport that was not covered by the contract of carriage and in respect of which it did not assume the obligation to carry the goods. Such a provision ran counter to the spirit of the draft convention, which aimed to secure the rights and define the obligations of the parties concluding a contract. Draft article 13 should therefore be deleted.

74. **Ms. Downing** (Australia) agreed that draft article 13 should be deleted.

75. **Mr. Delebecque** (France) said that draft article 13 was problematic because it was not clear, at least not in the French version, and because it was contrary to the general objective of the draft convention. France had already stated its reservations on the subject and was in favour of deleting the draft article.

76. **Ms. Czerwenka** (Germany) said that her delegation, too, had a number of concerns regarding draft article 13. At the Working Group's twenty-first session, the German delegation had sought clarification. The current version was slightly better, but a great deal of uncertainty remained. Referring members to Germany's written comments (A/CN.9/658/Add.11, para. 8), she said that her delegation was concerned, above all, that in the case of a negotiable transport document it was not clear from whom the holder of the document could require the delivery of the goods. Article 1, paragraph 14, defined transport document as "a document issued under a contract of carriage". Article 13, however, dealt with something else altogether, hence the uncertainty. The simplest option would be to delete the draft article, since it was not necessary for the purposes of the draft convention.

The meeting rose at 6 p.m.

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Forty-first session

Summary record of the 867th meeting
Held at Headquarters, New York, on Tuesday, 17 June 2008, at 10 a.m.

Chairperson: Mr. Illescas ..... (Spain)

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Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea (*continued*)

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08-38630 (E)

The meeting was called to order at 10.15 a.m.

Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea (*continued*) (A/CN.9/642, A/CN 9/645, A/CN.9/658 and Add.1-13)

Draft article 13 (Transport beyond the scope of the contract of carriage) (*continued*)

1. **Mr. Kim** Bong-hyun (Republic of Korea) said that his delegation had withdrawn its objections to the current wording of draft article 13 and supported its approval.

2. **Mr. Egbadon** (Nigeria) said that draft article 13 was meaningless since the carrier's responsibility did not extend beyond the period covered by the contract of carriage. His delegation therefore agreed that the draft article should be deleted.

3. **Ms. Carlson** (United States of America) said that it was actually in the interests of shippers for draft article 13 to be retained, since the carrier could only agree to transport beyond the scope of the contract of carriage "on the request of the shipper". Consequently, there was no basis for the arguments of some delegations that the deletion of draft article 13 would be beneficial to the shipper. On the contrary, draft article 13 should be retained in its current form.

4. **Mr. van der Ziel** (Observer for the Netherlands) recalled that draft article 13 was closely related to draft article 12, paragraph 3, which determined the carrier's period of responsibility for the carriage of goods as being from the time of their unloading until the completion of their unloading under the contract of carriage. Draft article 13 provided two exceptions to the carrier's period of responsibility: in relatively infrequent cases when the shipper required a document to a particular destination not served by the carrier; and in far more frequent cases of "merchant haulage" when, for operational reasons, the consignee, instead of the carrier, wished to take responsibility for the final part of the carriage of the goods from the port of discharge to the inland destination.

5. It was therefore in the interests of the consignee for draft article 13 to be retained, since its deletion would not allow the carrier to honour a request for merchant haulage, since the carrier would become responsible for the goods in the final part of the carriage in accordance with draft article 12, paragraph 3. Moreover, draft article 43 provided that the transport document constituted conclusive evidence of all contract particulars, whereas under the Hague-Visby Rules it was conclusive evidence as to the goods only, so that the matter of who was responsible for the goods during the final part of the carriage could be dealt with contractually.

6. One possible solution was to delete draft article 13 and add a sentence to the second paragraph of article 14, stipulating that the consignee and the carrier could mutually agree on merchant haulage. However, in view of the existing objections of some delegations to the wording of draft article 14, paragraph 2 that proposal would not appear to be acceptable either.

7. **Mr.** Ibrahima Khalil **Diallo** (Senegal) said that his delegation was in favour of the deletion of draft article 13 in view of its problematic nature.

8. **Mr. Hu** Zhengliang (China) said that his delegation was in favour of retaining draft article 13 in its current form since there was a practical need for such provisions, particularly in cases of multimodal transport. It was clear that the interests of third parties other than the shipper would be sufficiently protected, since the draft article required a transport document or an electronic transport record to specify the transport not covered by the contract or carriage. The retention of draft article 13 would facilitate maritime trade, especially with regard to multimodal transport.

9. **Mr. Mayer** (Switzerland) said that his delegation supported the retention of draft article 13, which reflected a long-standing practice that required shippers to hold documents to prove that they had actually shipped goods to their final destinations.

10. **Mr. Elsayed** (Egypt) said that his delegation advocated the deletion of draft article 13 because its wording was not consistent with the other provisions of the draft convention: it did not specify the rights or liabilities of the contracting parties and was actually detrimental to the shipper.

11. **Mr. Imorou** (Benin) said that the French version of draft article 13 was unclear. Moreover, the draft article itself was irrelevant since it referred to transport beyond the scope of the contract of carriage.

12. **Mr. Zunarelli** (Italy) said that the current wording of draft article 13 was not in keeping with the definition of "transport document" in the draft

convention, although it reflected the practical needs of international trade. It might therefore be useful to retain the current wording, followed by a clarification that the carrier would act as a forwarding agent on behalf of the shipper for the remaining part of the carriage of the goods.

13. **Mr. Tsantzalos** (Greece) said that his delegation supported the retention of draft article 13 in its current form in order to clarify the period of responsibility of the carrier.

14. **Mr. Ndzibe** (Gabon) said that his delegation was in favour of the deletion of draft article 13 since it gave rise to such confusion.

15. **Mr. Bigot** (Observer for Côte d'Ivoire) said that the provisions of draft article 13 presented a number of difficulties. First, while practical reasons existed for including provisions to address transport beyond the scope of the contract of carriage, the current wording failed to indicate clearly whether or not the single transport document required was a multimodal contract. A definition of "single transport document" in the draft convention might allow delegations to better measure the scope of the draft article and to draw conclusions with respect to the carrier and the shipper requesting the transport of the goods. Second, the interests of the shipper were not necessarily protected merely because it was the shipper that requested the transport of the goods. Third, there was a lack of clarity regarding the legal relationship between the carrier issuing the single transport document and the party providing the transport but not assuming full responsibility for it. In view of those difficulties, draft article 13 should not be retained.

16. **Mr. Sato** (Japan) said that delegations had expressed both theoretical and practical concerns about draft article 13. From a theoretical standpoint, the proposal put forward by the Italian delegation had already been discussed and discounted by Working Group III (Transport Law) because delegations had opposed the regulation of forwarding agency relationships under the draft convention. With regard to the practical aspects, the purpose of the current provisions of draft article 13 was to maintain existing commercial practices under the Hague-Visby and Hamburg Rules. It was regrettable that many delegations were still unable to interpret the provisions in that light but encouraging to see that the delegation of the Republic of Korea had come to appreciate the need for such provisions.

17. While his delegation supported the retention of draft article 13, its deletion would not imply that the relevant commercial practices had been abolished. For that reason, his delegation would not strongly object to the deletion of the draft article. Nevertheless, such a deletion could lead to a degree of uncertainty in current commercial practices. In any event, it was vital to ensure that any deletion did not imply the abolition of current merchant haulage practices, as had been mentioned earlier by the delegation of the Netherlands.

18. **Ms. Malanda** (Observer for the Congo) agreed with the reservations expressed by the observer for Côte d'Ivoire concerning the unclear scope of the single transport document issued by the carrier. Her delegation was therefore also in favour of the deletion of draft article 13.

19. **Mr. Møllmann** (Observer for Denmark) said that his delegation saw the provisions of draft article 13 as an attempt to codify commercial practices in order to ensure that shippers obtained the transport documents that they required. While the deletion of draft article 13 would not imply the abolition of current practices, it would be preferable to retain the current text in order to have a clear rule, particularly in view of the concerns expressed by the observer for the Netherlands. References to matters of agency had specifically been removed from previous draft texts, following a policy decision by the Working Group. For that reason, the proposal of the delegation of Italy to refer to the forwarding agency would not be an acceptable compromise and it would be better to retain the current wording.

20. **Mr. Sharma** (India) agreed that draft article 13 was based on current commercial practices pursuant to the Hague-Visby and Hamburg Rules, but pointed out that a rather different approach had been adopted in the draft convention. Whereas under the Hamburg Rules the carrier acted as the agent of the shipper for the carriage of goods not covered by the original carrier, under draft article 13 the period of responsibility of the carrier was the term of reference used to clarify that the carrier was not responsible for the portion of carriage beyond the contract of carriage.

21. The specific merit of draft article 13 was that it allowed the shipper to request a single transport document when the carrier was not in a position to

carry the goods or was unwilling to do so. The retention of that principle in the draft convention would not harm the interests of any parties. His delegation was therefore in favour of retaining draft article 13 as it stood.

22. **Ms. Czerwenka** (Germany) said that one way to solve the dilemma regarding article 13 would be to state that only a non-negotiable transport document was acceptable. In her view, it was a question of proof, and restricting the scope of the article was a possible way to compromise, although her delegation favoured its deletion.

23. **Ms. Sobrinho** (Observer for Angola) said that her delegation also favoured deletion.

24. **Mr. Sato** (Japan) said that if the article was redrafted as proposed, that would be a clear indication that the issuance of a negotiable document was totally prohibited, which would represent a complete departure from current practice. In that case, his delegation would prefer to delete the article, as the proposal of the delegation of Germany could have a drastic effect on current practice.

25. **Mr. Mayer** (Switzerland) said that he supported the view expressed by Japan, as he also failed to see the benefit of such a restriction.

26. **Mr. Kim** Bong-hyun (Republic of Korea) said that his delegation favoured leaving the text of article 13 as it was drafted.

27. **The Chairperson** said that the Commission faced a question of policy with regard to article 13. At the current stage in the discussion, a slight majority of members of the Commission appeared to favour deletion of article 13, the text of which had been arrived at by consensus in the Working Group. For the first time, however, the Commission faced the situation of having a majority decision overturn a consensus reached in a Working Group. From the tone of the interventions during the debate, most delegations appeared to accept the substance of the article but found that it was poorly expressed or difficult to understand. Deletion of the article would, however, lead to the prohibition of a long-standing commercial practice.

28. **Mr. Zunarelli** (Italy) said that his concern was that deletion of article 13 might imply that the current practice ran counter to the convention. In his view, there were two possible solutions. First, the article could be deleted but the Commission could put on record in its report that it had no intent to condemn the long-standing commercial practice covered by that article. Second, a small group of members could attempt to redraft the article in order to clarify its intent, perhaps by adding a new definition of the type of contract required.

29. **Mr. Elsayed** (Egypt) said that he supported the first option, deletion of the article accompanied by a declaration regarding current practice.

30. **Mr. Schelin** (Observer for Sweden) said that in his view, deletion of the article along with a declaration of intent was a better option than attempting to redraft it.

31. **Mr. van der Ziel** (Observer for the Netherlands) said that he had difficulty with the first option proposed by Italy because it was unlikely that the report of the Commission would be read by practitioners, whereas the convention would be widely available. His concern regarding deletion of the article was that some practices would thus become legally impossible, allowing no latitude for deviation from the minimum period of responsibility of the carrier. The Commission must either improve the text or accept the legal consequences of deletion.

32. **Mr. Delebecque** (France) agreed that the language of draft article 13 was ambiguous. The text should specify that the express request of the shipper was required and should state the action positively.

33. **Ms. Carlson** (United States of America), supported by **Mr. Serrano Martinez** (Colombia), said that her delegation, too, had concerns about deleting the article and supported the proposal to attempt to redraft it.

34. **Mr.** Ibrahima Khalil **Diallo** (Senegal) said that his delegation advocated deletion of draft article 13.

35. **Mr. Hu** Zhengliang (China) said that, since the purpose of the debate was to improve the draft convention, a small group in informal consultations should attempt to redraft the article in order to achieve that objective.

36. **Mr. Egbadon** (Nigeria) said that in order to elevate trade practice to the level of a legal rule, liabilities and sanctions must be clearly spelled out; the current text of the draft article did not do so and should be deleted.

37. **Ms. Slettemoen** (Norway) and **Ms. Talbot** (Observer for New Zealand) supported the proposal to redraft the article in an attempt to reach consensus.

38. The Chairperson said he took it that the Commission vested to hold informal consultations on draft article 13. If it was still unable to reach consensus, the draft article would be deleted.

39. *It was so decided.*

The meeting was suspended at 11.35 a.m. and resumed at noon.

Article 14 (Specific obligations)

40. **Mr.** Ibrahima Khalil **Diallo** (Senegal) said that draft article 14 had been debated at great length in the Working Group. His delegation, along with other African States, had expressed reservations with regard to the title and paragraph 2 of the draft article. The title "Specific obligations" did not reflect the content of paragraph 1, which described obligations that were traditionally performed by the carrier; therefore, the title should read "General obligations". Paragraph 2 should be deleted because it made the consignee, who was not a party to the contract of carriage, subject to provisions to which it had not consented.

41. **Mr. Imorou** (Benin) endorsed the statement made by the representative of Senegal and suggested merging draft articles 14 and 15 under the single title "General obligations". Neither article mentioned any specific obligations; the obligations listed in article 14 were standard.

42. **Mr. Elsayed** (Egypt) endorsed the suggestion made by the representative of Senegal, calling for deletion of draft article 14, paragraph 2. He also proposed adding marking of goods to the obligations defined in paragraph 1 and noted that loading, stowing and related obligations were the responsibility of the master of the ship.

43. **Ms. Slettemoen** (Norway) said that her delegation continued to prefer retaining the current version of paragraph 2.

44. **Ms. Malanda** (Observer for the Congo) and **Mr. Egbadon** (Nigeria) joined the delegations of Senegal and Egypt in calling for the deletion of paragraph 2.

45. **Mr. Delebecque** (France) noted that paragraph 2 addressed the issue of clauses under which the carrier did not perform certain obligations, particularly loading and unloading. Paragraph 2 might settle the question that arose under the Hague-Visby Rules as to whether such clauses were valid. The British House of Lords had recognized such clauses, while elsewhere, supreme courts, particularly in France, had expressed serious reservations about them. Paragraph 2 took an innovative approach to the matter and generally recognized the validity of those clauses. Though such clauses were perfectly acceptable in so-called "tramping" operations where ships did not operate on a fixed route or schedule, his delegation expressed the hope that, after careful consideration, the clauses would not apply to regular liner transportation.

46. **Mr. Zunarelli** (Italy) said that the title "Specific obligations", meaning obligations that were specifically formulated, accurately represented the content of the draft article and should therefore be retained. The proposed title "General obligations" was incorrect. No reference to marking should appear in paragraph 1, as had been suggested, because marking the goods was the responsibility of the shipper, not the carrier.

47. Paragraph 2 reflected normal practice in the tramping trade, but not in the liner trade. Any contract in the liner trade that precluded the responsibility of the shipper for obligations such as loading and stowing of the goods onto the ship should be regarded with suspicion; therefore, his delegation joined the French delegation in suggesting that paragraph 2 should be restricted to the tramping trade.

48. **Ms. Mbeng** (Cameroon) agreed with the Senegalese delegation that the obligations listed in draft article 14 were traditionally assumed by the carrier and therefore should not be referred to as "specific" in the title. Her delegation also wondered why the consignee should assume responsibility for a contract to which it was not a party and joined other delegations in calling for the deletion of paragraph 2.

49. **Mr. Ngoy Kasongo** (Observer for the Democratic Republic of the Congo) said that his delegation aligned itself with the other African States calling for the deletion of paragraph 2 and echoed the suggestion made by the delegations of Senegal, Nigeria and Cameroon regarding amendment of the title. The Commission should keep the draft convention from establishing exceptions to the rule in practice as a result of overusing standard clauses.

50. **Mr. Blake-Lawson** (United Kingdom) said that his delegation supported the retention of paragraph 2, which allowed for the shipper and the carrier to reach an agreement as to who loaded the goods. When that paragraph was read in conjunction with draft article 18, paragraph 3 (i), the carrier was relieved of any liability. His delegation considered those provisions helpful and satisfactory in overcoming problems that had arisen under previous conventions with "free-in-and-out" and "free-in-and-out, stowed"(FIO(S)) clauses.

51. **Mr. Sato** (Japan) said that his delegation fully supported the current wording of draft article 14, paragraph 1, and was grateful for the French delegation's statement, which clarified why draft article 14, paragraph 2, was necessary, and how it represented an improvement over the current situation. Although the French proposal to restrict the application of paragraph 2 to non-liner trade was interesting. FIO(S) clauses were also used in the liner trade, particularly for the carriage of large machinery or other special equipment. Therefore, it would be best to retain the current formulation of paragraph 2. In such a situation, draft article 83 (b) might be helpful, but the requirements under draft article 82, paragraph 2 (b), were too strict and provided inadequate protection.

52. **Mr. Møllmann** (Observer for Denmark) stressed that liner trade was not restricted to container transport. Generally, the FIO(S) clause represented a sound solution when the shipper had better knowledge of how to handle the goods than the carrier did. An example of FIO(S) application in liner trade cited by Danish industry representatives was the carriage of coffee in bags, which had specific ventilation requirements. His delegation favoured the retention of draft article 14, paragraph 2, in its current wording, with no distinction between liner and non-liner trade.

53. **Mr. Bigot** (Observer for Côte d'Ivoire) endorsed the proposal made by the Senegalese delegation to change the title of draft article 14 from "Specific obligations" to "General obligations", as the obligations mentioned were those typically assumed by the carrier and could not be considered specific. He noted that draft article 14, paragraph 2, described a possible agreement between the shipper and the carrier, under which the shipper assumed some of the obligations mentioned. If such arrangements were only common practice in the tramping trade, which the draft convention had not been designed to regulate, it followed that paragraph 2 should be deleted. It should also be stressed that the draft convention had been designed to regulate transport, not sales. Lastly, given the economic circumstances of developing countries like his own — where shippers were in the majority — and the burden that extra obligations represented, it was important to strike a fair balance between the responsibilities of shippers and carriers.

54. **Mr. Mayer** (Switzerland) said that the current title of the draft article should be retained, as it concerned specific obligations, not special obligations. With regard to paragraph 2, he agreed with the proposal to add marking to the shipper's obligations, since marking had always been one of the shipper's main tasks, as reflected in the Hague-Visby Rules and other instruments. He was strongly in favour of keeping paragraph 2 as a whole. It was not an escape clause: it reflected a long-standing practice not only in the tramping trade, but also in the liner trade, albeit to a lesser extent. For commercial, technical or logistical reasons, shippers often undertook some of the carrier's responsibilities. Where the shipper had agreed to carry out restricted FIO(S) shipments, it would be unfair to impose responsibility on the carrier for damage that occurred during loading merely because paragraph 1 made it mandatory for such responsibility to fall to the carrier.

55. **Mr. Ndzibe** (Gabon) said that he supported deleting draft article 14, paragraph 2, because it posed a genuine danger to shippers, especially small shippers. He would also like to see the title changed as suggested by the representative of Senegal.

56. **Ms. Traoré** (Burkina Faso), supported by **Mr. Ousseimi** (Observer for the Niger) and **Ms. Sobrinho** (Observer for Angola), endorsed the statement made by Senegal.

57. **Ms. Downing** (Australia) said that her delegation endorsed the proposal to delete draft article 14, paragraph 2, for the reasons set out in its written comments (A/CN.9/658, paras. 24-25).

58. **Mr. Morán Bovio** (Spain) said that it was crucial to maintain paragraph 2 because it reflected an existing commercial practice, even in liner trade. In some cases in liner trade it was important for the shipper, rather than the carrier, to be able to handle cargo, such as coffee, cranes and yachts, which required special care. To delete paragraph 2 would be to impede the small shipper's ability to have certain goods transported.

59. **Mr. Schelin** (Observer for Sweden) said that he supported changing the title of draft article 14 because the obligations set out were of a general rather than a specific nature; he suggested replacing the current title with "Obligations in relation to the goods". However, he was in favour of retaining the contents of draft article 14 in its current version. Furthermore, paragraph 2 should not be restricted to non-liner trade. Indeed, a gray area existed between liner and non-liner transportation; such transportation was often referred to as "industry shipping", in which ships entered and left ports on a specific schedule and loaded specific types of cargo, and shippers often made use of FIO(S) clauses.

60. **Ms. Carlson** (United States of America) said that her delegation was in favour of maintaining draft article 14 as currently formulated, including the title. Paragraph 2 reflected current, useful commercial practice. As the purpose of the draft convention was to facilitate industry, it would be inappropriate to attempt to restrict a practice that had existed for decades.

61. **Mr. Sharma** (India) said that he supported the title of draft article 14 as it stood, since the general nature of the obligations of the carrier was clear from the title of the chapter containing article 14. The current formulation of paragraph 1 was adequate, with no need for reference to marking, as that was usually the responsibility of shippers, not carriers. As for paragraph 2, while the Working Group had not considered non-liner trade in its discussion of the paragraph, a shipper wishing to enter into a contract with a carrier in order to take over some of the latter's standard duties should not be prevented from doing so.

62. **Ms. Peer** (Austria) said that her delegation strongly supported retaining draft article 14, paragraph 2.

63. **Mr. Cheong** Hae-yong (Republic of Korea) said that his delegation was in favour of maintaining the current version of draft article 14.

64. **Mr. Sandoval** (Chile) said that draft article 14 should be retained as it stood. As an exporter of copper and other goods, Chile did not take issue with paragraph 2, since the carriage of goods was usually based on an agreement between the shipper and the carrier.

65. **Ms. Eriksson** (Observer for Finland) expressed support for maintaining draft article 14 as currently formulated, including paragraph 2, which reflected a commercial practice in both non-liner and liner trade.

66. **Mr. Hu** Zhengliang (China) said that his delegation strongly supported retaining draft article 14 in its entirety. The words "may agree" in paragraph 2 implied that the paragraph was in fact about a matter of freedom of contract. As such, it should not pose a problem, as the shipper was in no way obliged to enter into such a contract.

67. **Mr. Tsantzalos** (Greece) reiterated that his delegation wished to see draft article 14 maintained in its entirety, but had no strong feelings regarding the title and would welcome an alternative if the majority of Commission members found it more satisfactory.

68. **Mr. Egbadon** (Nigeria) pointed out that paragraph 2, extended responsibility to the consignee, a particularly objectionable proposition since the consignee was not a party to contracts between the shipper and the carrier. If the draft convention was to be acceptable to shipping and cargo interests, that paragraph should be deleted.

69. **Mr. van der Ziel** (Observer for the Netherlands) said that the title of draft article 14 was acceptable in its current version. The word "consignee" was used in paragraph 2 merely because the clauses involved in agreements between the shipper and the carrier were FIO(S) clauses; however, the agreements themselves were only between the shipper and the carrier. Paragraph 2 as such placed no obligation on the consignee with regard to unloading.

70. **Mr. Berlingieri** (Italy) said that he questioned the compatibility of draft article 14, paragraph 2, and draft article 12, paragraph 3. He feared that those two articles might give rise to differences in interpretation in the future, particularly within the context of a free-in clause, where receipt of the goods was usually assumed to take place on board the ship, whereas under article 12, paragraph 3, receipt must be assumed to have taken place prior to loading.

71. **Mr. Lebedev** (Russian Federation) said that it was important to discuss not only the legal aspects of draft article 14, but also the economic, technical and financial implications of the carriage of goods by sea. The question was not merely one of obligations regarding loading and unloading, since other articles of the draft convention also dealt with those, but rather of financial responsibility for property, which would pose

no problem if all loading and unloading operations were carried out by the carrier alone and not the shipper or consignee. Unfortunately, it was not always that simple, as loading and unloading by the carrier often incurred additional costs. Draft article 14 in its current version took account of the great variety of situations that arose in maritime transport. As argued by other speakers, it also reflected actual current practice. For all those reasons, his delegation was in favour of keeping draft article 14 as it stood.

The meeting rose at 1.05 p.m.

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Summary record of the 868th meeting
Held at Headquarters, New York, on Tuesday, 17 June 2008, at 3 p.m.

Chairperson: Mr. Illescas ..... (Spain)

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Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea (*continued*)

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08-38636 (E)

The meeting was called to order at 3.10 p.m.

Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea (*continued*) (A/CN.9/642, A/CN.9/645 and A/CN.9/658 and Add.1-13)

Draft article 14 (Specific obligations) (*continued*)

1. **Mr. Oyarzábal** (Observer for Argentina) said that in an attempt to address the concerns raised by the African States in particular, his delegation proposed inserting text along the lines of "to the extent that the particular characteristics of the goods so require" in paragraph 2, so as to make it clear that the carrier or shipper could stipulate that the loading, handling, stowing or unloading of the goods was to be performed by the shipper only when the particular characteristics of the goods so required. He also proposed amending the title of draft article 14 to read "Obligations to properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods" and deleting the word "specific" in the title of draft article 15 so that it read "Obligations applicable to the voyage by sea".

2. **Mr. Mayer** (Switzerland) said that the purpose of paragraph 2 was to limit paragraph 1; there was no intention whatsoever to place an obligation on the consignee. His delegation had made that clear during the Working Group's discussions on draft article 45, paragraph 2, which had ultimately been deleted. All aspects of the consignee's responsibilities would be governed by national law. In that connection, he referred the Commission to paragraphs 148 to 150 of the Working Group's report (A/CN.9/645).

3. **Ms. Czerwenka** (Germany) said that the criticisms of the draft article's title were warranted; the obligation to carry the goods was not a specific obligation but a key obligation of the carrier. Her delegation therefore endorsed the proposal made by the representative of Sweden at the morning meeting (A/CN.9/SR.867) to amend the title to read "Obligations in relation to the goods".

4. She also took the point made by the Italian delegation at the morning meeting (A/CN.9/SR.867) that it was important to consider the relationship between draft article 14, paragraph 2, and draft article 12, paragraph 3, which made it impossible to do away with the obligation to load and unload the goods. However, the relationship was not entirely clear and should, perhaps, be looked at further. Since the text already contained that specific provision on loading and unloading, her delegation could support the retention of the current version of draft article 14, paragraph 2, provided the reference to the consignee was removed. Contrary to the Swiss interpretation, her delegation believed that paragraph 2 did give the impression that an obligation could be placed on the consignee through a written agreement between the carrier and the shipper.

5. **Mr. Serrano Martínez** (Colombia) said that draft article 14, paragraph 1, clearly set out the carrier's obligations, unlike the Hague-Visby Rules, which were vague in that regard. Paragraph 2 reflected the primacy of the will of both the carrier and the shipper, since the carrier and the shipper could agree that the shipper, the documentary shipper or the consignee would perform certain specific obligations. His delegation therefore supported the current version of both the title and the text of draft article 14.

6. **The Chairperson** said that since none of the proposals appeared to enjoy broad support, he took it that most delegations preferred to retain the current version of the text.

7. *Draft article 14 was approved in substance and referred to the drafting group.*

Draft article 15 (Specific obligations applicable to the voyage by sea)

8. **Mr. Elsayed** (Egypt) said that the general reference to "due diligence" in the chapeau of draft article 15 was insufficient, since due diligence was governed by many different criteria. He therefore proposed inserting after "due diligence" a reference to the prevailing standards of maritime safety.

9. **Mr.** Amadou Kane **Diallo** (Senegal) said that, just as other delegations had proposed having the title of draft article 14 refer to obligations concerning the cargo, the title of draft article 15 could refer to obligations concerning the ship. Such wording would reflect more accurately the content of the draft articles in question.

10. **Mr. van der Ziel** (Observer for the Netherlands) said that overall draft article 15 was acceptable to his delegation. He did wish, however, to introduce some minor drafting changes in subparagraph (c). The current wording suggested that containers were an

intrinsic part of the ship; there were many examples of parties making that argument in litigation. To remove any ambiguity, he proposed amending the beginning of the subparagraph so that it read: "Make and keep the holds, all other parts of the ship in which the goods are carried and any containers supplied by the carrier in or upon which the goods are carried ...".

11. At the twenty-first session of Working Group III (Transport Law), the Dutch and Swedish delegations had proposed changing the definition of "container" so as to include road and railroad cargo vehicles. The Working Group had decided that the appropriateness of the definition would be considered in each provision where the word "container" appeared. Draft article 15, subparagraph (c), was one provision where the appropriateness of expanding the definition had not yet been considered. He therefore proposed that the change in the definition of "container" should be taken into account when considering draft article 15.

12. **Mr. Tsantzalos** (Greece) said that, in order to be broadly accepted by the international community, a new convention should safeguard a fair balance of rights and liabilities and, therefore, a fair allocation of risk between the parties to the contract of carriage. In that context, draft article 15 created an imbalance between the interests of carriers, on the one hand, and shippers, on the other.

13. Greece had already expressed its reservations about the extension of the carrier's obligation to exercise due diligence in relation to the vessel's seaworthiness to cover the entire voyage. As stated in its written comments on the draft convention (A/CN.9/658/Add.10, para. 4), owing to that and other new elements, the carrier would be exposed to greater liability under the new convention than under existing international practice (in other words, the Hague-Visby Rules), which would result in a shift in the allocation of risk between the parties. For that reason, his delegation would have preferred it if that obligation had not been included in the draft convention. He had no intention, however, of reopening the debate at the current juncture. His delegation supported the minor drafting changes proposed by the delegation of the Netherlands.

14. **Mr. Bigot** (Observer for Côte d'Ivoire) wondered if the secretariat might be able to look at the French version of the draft article, especially subparagraph (c), since the current wording was unclear.

15. **The Chairperson** said that the request had been noted.

16. **Mr. Mollmann** (Observer for Denmark), responding to the representative of the Netherlands, said that, as far as he recalled, the Working Group had agreed not to extend the definition of "container" per se but rather to look at the appropriateness of the definition article by article and add a reference to road or railroad cargo vehicles where the context so required. Such a reference was unnecessary in the draft article in question, since it was very rare for carriers to supply road or railroad cargo vehicles to the shipper. That said, if such a practice did exist — or came to exist in the future — then road and railroad cargo vehicles should be treated in the same way as containers. His delegation was, therefore, open to the idea of extending the definition in draft article 15, subparagraph (c), in line with the Dutch proposal. The minor drafting changes proposed by the Netherlands, meanwhile, had his delegation's full support.

17. **Mr. Kim** Bong-hyun (Republic of Korea) endorsed the drafting changes proposed by the observer for the Netherlands.

18. **Mr. Berlingieri** (Italy) said that his delegation supported the first proposal of the Netherlands, namely, to refer in article 15, subparagraph (c), to "the holds, all other parts of the ship in which the goods are carried and any containers supplied by the carrier in or upon which the goods are carried". However, a reference to road or railroad cargo vehicles, however appropriate elsewhere, was not called for in draft article 15, since it would be quite unusual for the carrier to supply such vehicles.

19. **Ms. Carlson** (United States of America) said that her delegation could support the first Netherlands proposal but would appreciate clarification as to the exact wording proposed for the reference to road or railroad cargo vehicles.

20. **Mr. Sharma** (India) said that Denmark and Italy were correct in the points they had raised: the agreement in the Working Group had in fact been, not to change the definition of "container" to encompass road and railroad cargo vehicles, but to decide article by article whether to include a reference to them. Such a reference was not warranted in draft article 15, since cases where the carrier supplied road or railroad cargo vehicles were very rare.

21. With regard to the chapeau, which stated that "the carrier is bound to exercise due diligence", he would like to know whether the obligation of the carrier was to exercise due diligence or actually to do the things listed in subparagraphs (a), (b) and (c), in other words, to make and keep the ship seaworthy and so forth.

22. **Mr. Oyarzábal** (Observer for Argentina) said that the obligation imposed on the carrier to exercise due diligence indeed appeared to be an obligation of means. His delegation thought that the obligation should be one of result: the carrier should be required to ensure that the ship was seaworthy and should be held liable for the consequences if it was not maintained in a seaworthy condition.

23. **Mr. Tsantzalos** (Greece) said that his delegation could support the Netherlands' proposals but was not in favour of changing the definition of "container".

24. **Mr. Mayer** (Switzerland) said that his delegation supported the Netherland's first proposal, which would prevent claimants from asserting that containers were part of the ship. Otherwise, the current wording of the draft article should be retained, in particular the words "during the voyage". The requirement that due diligence must be observed throughout the voyage constituted an important improvement in maritime law.

25. **Mr. Sato** (Japan) said that the first Netherlands proposal was not a change of substance but a necessary clarification to ensure that containers were not considered an intrinsic part of the ship; his delegation could support it. It could also support the substance of the second proposal, but would prefer to implement it, not by changing the definition of "container", but by adding a reference to road and railroad cargo vehicles to subparagraph (c). It was true that for a carrier to supply a road or railroad cargo vehicle was a rare occurrence, but if it did so, it should be obliged to keep it in an appropriate condition.

26. **Mr. Elsayed** (Egypt) said that his delegation agreed with the representative of the Netherlands that the wording needed to be consistent with the prevailing situation. He proposed that the words "in which the goods are carried" should be deleted the first time they appeared in subparagraph (c).

27. **The Chairperson** said he took it that the Commission approved of the proposal to change the first part of draft article 15, subparagraph (c), so that it would read: "Make and keep the holds, all other parts of the ship in which the goods are carried and any containers supplied by the carrier in or upon which the goods are carried ...". However, there did not seem to be a consensus in favour of other amendments.

28. *Draft article 15, as amended, was approved in substance.*

Draft article 16 (Goods that may become a danger)

29. **Mr. Elsayed** (Egypt) proposed that a proviso should be added at the end of draft article 16 to the effect that, in order to evade liability for the measure contemplated by the article, the carrier must declare that it was unaware that the goods were dangerous or might become a danger; and, if the carrier took measures damaging to the goods, it must justify those measures and explain why it could not take less drastic measures.

30. **Ms. Czerwenka** (Germany) said the concern seemed to be that draft article 16 allowed the carrier broad discretion to destroy goods since draft article 18, paragraph 3 (o) released the carrier from liability for acts "in pursuance of the powers conferred by articles 16 and 17". But if the carrier accepted goods, having been informed by the shipper pursuant to draft article 33 that they were dangerous in nature, and did not take appropriate measures, it would seem that the carrier should be liable for later destroying the goods on the grounds that they were or appeared likely to become a danger. Her delegation could therefore support the proposal for a proviso that the carrier in order to escape liability must not have been aware of the dangerous nature of the goods. Justification of the reasonableness of the actions taken, however, could be left to the litigation stage.

31. **Mr. Mayer** (Switzerland) said that the overall system was coherent and right. Draft article 16 was part of chapter 4 on obligations of the carrier, which were essentially to keep the ship seaworthy and to take proper care of the cargo. The draft article simply made the point that the mere act of destroying cargo was not necessarily a breach of the carrier's obligations. Chapter 5, on the other hand, dealt with the liability of the carrier for loss, damage or delay and addressed the concerns just raised.

32. Draft article 16 did not apply to goods of a dangerous nature as such, which were of necessity often carried in trade, but to goods that actually became or were likely to become a danger in the course

of carriage. In such cases the carrier had an obligation to take action to protect the ship, the crew and the other cargo, even if that entailed sacrificing the goods. Notwithstanding the exemption from liability allowed under draft article 18, paragraph 3 (o), the carrier was not exempt from the test of reasonableness, stipulated in draft articles 16 and 17, or the other tests set out in draft article 18, paragraphs 4 and 5. Moreover, if the shipper had duly informed the carrier pursuant to draft article 33 that the goods to be shipped were dangerous in nature, the carrier could not bring a liability action against the shipper. Thus, there were many checks on the carrier's discretion to damage or destroy cargo, and there was no need to change the text of draft articles 16 and 17.

33. **Mr. Sato** (Japan) said that his delegation agreed that the system, taken as a whole, was adequate and did not need to be changed. In a situation where the carrier had accepted dangerous goods after being informed of their nature by the shipper, the carrier would certainly have an obligation to take appropriate safety measures, and if the carrier contributed to the circumstance necessitating the damage or destruction of the goods it would be liable under draft article 18, paragraph 4 (a), notwithstanding the exemption from liability under paragraph 3 (o) and the powers conferred by draft articles 16 and 17.

34. **Mr. Berlingieri** (Italy) said that two situations could be envisaged. If potentially dangerous goods were loaded onto a ship with the carrier's knowledge and were subsequently sacrificed at sea, and if the carrier was unable to show that the danger had increased during the voyage, the carrier would be liable under draft article 18. If, however, the situation changed so that the theoretical danger posed by such goods became real — for example, if they exploded or caught fire — and were sacrificed in order to prevent further harm, to hold the carrier liable would be tantamount to transferring liability from the shipper to the carrier, which was unacceptable. Draft article 16 should be left unchanged.

35. **Mr. Elsayed** (Egypt) said that draft article 16 envisaged a situation in which the carrier did not realize that the goods posed a potential danger; the situation envisaged in draft article 18 was quite different. The Commission would need to decide how that difference should be reflected in the draft articles.

36. **The Chairperson** noted that there did not appear to be sufficient support for the proposed amendments.

37. *Draft article 16 was approved in substance and referred to the drafting group.*

Draft article 17 (Sacrifice of the goods during the voyage by sea)

38. **Ms. Downing** (Australia), drawing attention to paragraphs 28 to 30 of her delegation's comments on the draft convention (A/C.9/658), said that the scope of draft article 17 was broader than the treatment of the issue under the Hague-Visby Rules or the Hamburg Rules and would afford a lesser degree of protection to shippers than current international law.

39. *Draft article 17 was approved in substance and referred to the drafting group.*

The meeting was suspended at 4.30 p.m. and resumed at 5 p.m.

Draft article 18 (Basis of liability)

40. **Mr.** Ibrahima Khalil **Diallo** (Senegal), drawing attention to paragraphs 8 to 12 of the comments on the draft convention submitted by Angola, Benin, Burkina Faso, Cameroon, Congo, Côte d'Ivoire, Democratic Republic of the Congo, Equatorial Guinea, Gabon, Ghana, Guinea, Guinea-Bissau, Mali, Mauritania, Niger, Nigeria, Senegal and Togo (A/C.9/658/Add.1), said that the position of those States had not changed during the lengthy discussions that had culminated in the current wording of draft article 18. Most of the States in his subregion were governed by the Hamburg Rules, which were worded differently from the draft article. The shipping industry had made tremendous technological strides over time and the exceptions listed in paragraph 3 were no longer valid; the industry, and especially small-scale shippers, would suffer from their inclusion. Paragraph 2 of the draft article was quite sufficient to protect the carrier and paragraph 3 should be deleted.

41. **Mr. Elsayed** (Egypt) said that his delegation would prefer to begin paragraph 3 with wording along the lines of "Unless the claimant proves that the carrier is at fault..."; however, the best solution would be to delete the entire paragraph, as the representative of Senegal had proposed.

42. **Ms. Downing** (Australia), drawing attention to paragraphs 31 to 37 of her delegation's comments on

the draft convention (A/C.9/658), said she realized that the Working Group had spent a great deal of time on the draft article and that the issue of liability was a complex one. However, like the representative of Senegal, her delegation had concerns about the list of exceptions contained in paragraph 3. The wording differed from that of the similar lists included in the Hague Rules and the Hague-Visby Rules and would need to be interpreted by the courts. In addition, the burden of proof would be more onerous for the claimant, particularly if the unseaworthiness of the ship was alleged. Proportional liability was frequently invoked as a stalling device; as noted in paragraph 37 of her delegation's comments, in a case where two or more causes, one of which was unseaworthiness, contributed to the loss or damage, the existing text provided no guidance as to who bore the onus of proof.

43. **Ms. Chatman** (Canada) said that her delegation's position, like those of the representatives of Australia and Senegal, remained unchanged. Canada's shipping industry had been consulted extensively and was of the view that draft article 18 would make the burden of proof excessively onerous for shippers. Paragraph 5, in particular, should be amended in order to place the burden of proof with respect to seaworthiness on the carrier, not the shipper.

44. **Mr. Imorou** (Benin), **Mr. Ndzibe** (Gabon), **Ms. Sobrinho** (Observer for Angola), **Mr. Bigot** (Observer for Côte d'Ivoire) and **Mr. Ousseimi** (Observer for the Niger) associated themselves with the statement made by the representative of Senegal.

45. **Mr. Tsantzalos** (Greece) said that, although he wished to reiterate his delegation's concern at the elimination of "nautical fault" from the list of exceptions, his delegation supported the draft article as it stood.

46. **Ms. Slettemoen** (Norway) said her delegation considered that draft article 18 was, in many ways, the core of the draft convention. The current wording was the result of years of difficult negotiations, and, although not perfect, should be left unchanged.

47. **Mr. Blake-Lawson** (United Kingdom), **Mr. Mayer** (Observer for Switzerland) and **Mr. Hron** (Czech Republic) said that draft article 18 should remain in its current form in its entirety, without deletion of paragraph 3.

48. **Ms. Czerwenka** (Germany) said she understood the concerns expressed by the delegations that wished to amend the draft article. As the representative of Senegal had noted, the list contained in paragraph 3 was not an example of modern law. Her delegation would prefer a clearer, shorter text but was prepared to support the majority view, whatever it might prove to be.

49. It seemed to her that the concern expressed by Australia in paragraph 37 of its written comments (A/CN.9/658) was addressed in the current text of draft article 18. Paragraph 5 of the draft article made it clear that in cases such as those mentioned in paragraph 37 of Australia's comments the burden of proving due diligence lay with the carrier, although the alternative wording proposed by Australia was more elegant. Her delegation was prepared to accept that proposal, but it could also accept the paragraph as it stood.

50. **Mr. Sato** (Japan) suggested that, for the sake of consistency, "including" should be deleted from paragraph 5 (a) (iii) and the passage should be reworded in order to reflect the amendment to draft article 15 (c) that had already been approved. His delegation would then be prepared to approve draft article 18.

51. **Mr. Cheong** Hae-yong (Republic of Korea) said that, even though his country's shipping industry was strongly in favour of restoring "nautical fault" to the list of exceptions in paragraph 3, his delegation joined those of Greece and Switzerland in calling for the draft article to be approved in its current form.

52. **Mr. Elsayed** (Egypt) said that under both written and common law, the carrier's liability was based not on the exercise of due diligence but on results. The amendment that his delegation had proposed would preserve the rights of the shipper where the carrier was at fault; if it was not accepted, the draft article should be deleted in order not to alter the balance between the contracting parties or to weaken a principle that all delegations wished to preserve.

53. **Mr. Egbadon** (Nigeria) said that he associated himself with the other African delegations. Paragraph 3, if approved in its current form, would negate all the progress achieved in the previous articles of the draft convention and particularly in chapter 4, which established the terms of the carrier's obligations. He urged delegations to consider the amendment proposed in paragraph 12 of document A/CN.9/658/Add.1.

54. **Mr. Schelin** (Observer for Sweden) said that, like the representative of Germany, he would have preferred a shorter version of paragraph 3; however, he was aware of the lengthy debate and the sensitive compromises that had culminated in the text that the Commission had before it. The representative of Japan's suggestion had merit, and his own delegation would like to propose that the brackets in paragraph 5 (a) (iii) should be removed and that "including" should be replaced by "and".

55. **Mr. Berlingieri** (Italy), endorsing the text as it stood said, by way of explanation to those delegations proposing amendments, that chapter 4 on obligations and chapter 5 on liability represented an overall compromise and should be read together. In chapter 4, in contrast to the Hague-Visby Rules, the carrier's obligations had been made continuous throughout the voyage; and in the draft convention's liability regime, two basic Hague-Visby exonerations — fault in navigation and fault in management of the ship — had been eliminated, significantly shifting the balance in favour of the shipper.

56. Regarding article 18, paragraph 3, whose deletion had been proposed, there was a misunderstanding: the list of exceptions in paragraph 3 were not exonerations but rather cases of reversal of the burden of proof. Perhaps that was a traditional approach, but it was one based on common sense and was certainly not obsolete. The purpose of the list was to reverse the burden of proof in situations where it was likely that the cause of the loss or damage was an event beyond the control of the carrier. A certain balance had been struck because the draft article allowed the shipper to prove that a different cause was at issue or that fault by the carrier had contributed to the loss or damage. The text was certainly not contrary to domestic transport law, which was generally based on fault and not on strict liability.

57. **Ms. Lost-Sieminska** (Poland), **Ms. Talbot** (Observer for New Zealand) and **Mr. Sandoval** (Chile) endorsed the current text and supported the technical correction to paragraph 5 (a) proposed by Japan and Sweden.

58. **Mr. van der Ziel** (Observer for the Netherlands) said that the compromise wording of article 18 drastically shifted the balance of interest in favour of cargo interests, and there was no need to go further than the draft already did. He therefore supported the text as it stood, with Japan's correction in the interest of consistency.

59. **Mr. Baghali Hamaneh** (Islamic Republic of Iran), expressing strong reservations to article 18, said that it should be amended to balance the interests of the carrier and the shipper. Paragraph 3 should be deleted because it provided too many grounds for exonerating the carrier. He would also prefer the deletion of paragraph 5; the carrier should be liable if the claimant proved fault. Paragraph 4, moreover, should be amended to put the shipper on a fairer footing and shield the shipper from the heavy burden of proving unseaworthiness claims whenever the carrier invoked one of the defences under paragraph 3.

60. **Ms. Carlson** (United States of America), supporting the remarks of Italy and the Netherlands, favoured retention of the current text, with the technical correction proposed by Japan. Years of negotiations by the Working Group had gone into producing the text, which was an essential part of a package of compromises; and it would be a deplorable mistake to introduce any amendments that might result in the failure of the draft convention.

61. **Mr. Alba Fernández** (Spain), endorsing the remarks of Italy, the Netherlands and the United States, said that the current wording of article 18 should be maintained. It preserved the traditional rules of carrier and shipper liability and the traditional treatment of the burden of proof in other maritime, air and road transport treaties. Under no circumstances would Spain agree to the removal of the need to prove the simple probability of the unseaworthiness of the ship.

62. **Mr. Imorou** (Benin), agreeing with the Italian delegation that the rules should be based on common sense, disagreed that the exceptions listed in article 18, paragraph 3, were not exonerations: they were simply disguised exonerations. The African countries were mainly shipping countries, and their shippers should certainly be able to impute latent defects to the carrier.

63. **Ms. Malanga** (Observer for the Congo) said that, like other African countries, she believed that article 18 was not the balanced text it purported to be. She would in particular support the deletion of paragraph 3, which provided so many grounds for relieving the carrier of liability.

64. **Mr. Hu** Zhengliang (China), noting the importance of article 18, said that the text was the

result of long discussions in the Working Group and should be retained, with Japan's technical correction. Even though China's shipping industry was not happy with the entire list in paragraph 3, his delegation favoured its retention because the exceptions enumerated would actually resolve uncertainties in practice.

65. **Ms. Eriksson** (Observer for Finland) said that although her delegation was not completely happy with the final draft of what was a very complex article and would have preferred a more streamlined text, it could accept it as it stood. However, she believed that it would be important to highlight in the Commission's report the explanation given earlier by Italy, that paragraph 3 did not list a series of exonerations but rather shifted the burden of proof.

66. **Mr. Mollman** (Observer for Denmark), observing that there should be a firm consensus before making any changes in a text arrived at after sensitive compromises in the Working Group, said that his delegation therefore endorsed as it stood. The consequential correction put forward by Japan could not be considered a change in that sense.

67. **Mr. Serrano Martínez** (Colombia) said that the basic assumption of article 18 was that the carrier had an obligation to deliver the goods in the same condition in which they had been received, an obligation both of result and of guarantee. On the most controversial point, it was therefore important to enumerate the exemptions that relieved the carrier of liability, especially since it was difficult to distinguish under the Hague-Visby Rules whether the carrier's liability was objective or subjective and whether there was to be presumption or proof of fault. His delegation was therefore in favour of retaining draft article 18 in its entirety in its current wording.

68. **Mr. Ngoy Kasongo** (Observer for the Democratic Republic of the Congo) said that the text of article 18 could be improved and that it was the Commission's task to carry forward the work done over the years in the Working Group. All the key articles of the draft convention had been the subject of sharp debate but a proper balance of interests had not yet been struck. If the current text was retained, the fundamental notion of the liability of the carrier became relative. He fully agreed that the concept of the burden of proof should be based on common sense. The list of exemptions in paragraph 3 were a boon for insurers but detrimental to the economies of the African States, and should be deleted.

69. **Mr. Sharma** (India) observed that the issue of liability had been very central to the Working Group's deliberations from the start. While noting that the list of exonerations in the Hague-Visby Rules had been eliminated from the subsequent Hamburg Rules, the Working Group had determined that the list had worked well in its time and indeed had been adopted in most national legislations. It had with difficulty arrived at a compromise text, which India believed should be retained, except for the technical correction to paragraph 5 (a).

The meeting rose at 6.05 p.m.

United Nations A/CN.9/SR.869

General Assembly

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United Nations Commission on International Trade Law

Forty-first session

Summary record of the 869th meeting
Held at Headquarters, New York, on Wednesday, 18 June 2008, at 10 a.m.

Chairperson: Mr. Illescas ..... (Spain)

Contents

Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea (*continued*)

This record is subject to correction.

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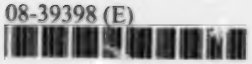
Any corrections to the record of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

08-39398 (E)



The meeting was called to order at 10.10 a.m.

Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea (*continued*) (A/CN.9/642, A/CN.9/645 and A/CN.9/658 and Add.1-13)

Draft article 18 (Basis of liability) (*continued*)

1. **Ms. Traoré** (Observer for Burkina Faso) said that, since draft article 18 was of central importance in the draft instrument, its wording should reflect the expressed concern to strike a balance between the various interests involved. Because of the lack of such a balance in that draft article, her delegation along with other African States had proposed in A/CN.9/658/Add.1 that paragraph 3 should be deleted and that the draft article should be restructured accordingly.

2. **Mr. Bigot** (Observer for Côte d'Ivoire), responding to the statement made by the delegation of Italy at the previous meeting, said that there was, in fact, an imbalance in the burden of proof requirements for shippers as opposed to carriers. Carriers were offered alternative possibilities of relief from liability, thereby benefiting from more advantageous treatment than shippers.

3. **Mr. Lebedev** (Russian Federation) said that, since the draft instrument was intended to regulate questions of obligation and liability in international trade, draft article 18 went to the heart of the matter. It was the result of a compromise and reproduced the provisions of article IV, paragraph 2, of the Hague-Visby Rules in that it listed events or circumstances that could serve to relieve the carrier of liability, as opposed to the Hamburg Rules, which did not set out such a list. However, he questioned the omission from that list of nautical fault, contained in the Hague-Visby Rules, since even in the modern age such accidents could occur. A compromise wording should be included in the draft convention to the effect that the carrier would be exonerated from liability in cases of fault in the navigation or in the management of the ship. The relative lack of success of the Hamburg Rules had been due to their omission of such a provision. It was important to give thought to the future of the draft convention and ensure that it would lend itself to broad application.

4. **Mr. Elsayed** (Egypt) reminded the Commission that the views he expressed were those of all the members of the League of Arab States and stressed the key role of maritime transport companies, which rendered valuable services to developed and developing countries alike. He recalled the provisions of draft article 2 relating to the observance of good faith and draft article 4 relating to the applicability of the proposed instrument in judicial and arbitral proceedings and said that time constraints should not prevent the Commission from attending to the practical matter of achieving a balanced text, particularly since its members were called upon to act as legislators. Everyone had the right to defend their own interests, while justice demanded that all interests should be taken into account. Since draft article 18, paragraph 2, would be nullified in cases where a carrier could not prove the absence of fault, he proposed that the following should be inserted at the beginning of that paragraph: "Unless the claimant proves that the damage was caused by a fault of the carrier or one of its representatives ...". He agreed with the proposal that paragraph 3 should be deleted. Paragraphs 1, 2 and 3 of the draft article seemed to have been framed in isolation from one another and failed to strike a balance between the interests of all the parties concerned.

5. **Ms. Mbeng** (Cameroon) said that if the draft convention was to achieve broad acceptability, there had to be a balance between the interests of shippers and carriers. Serious consideration should accordingly be given to the alternative wording of the draft article proposed in A/CN.9/658/Add.1, which entailed the deletion of draft paragraph 3. Moreover, it might well be difficult for a claimant to prove the unseaworthiness of a ship, as required by draft paragraph 5.

6. **Mr. Oyarzabál** (Observer for Argentina) said that paragraph 2 required a negative proof, which it would be hard to provide. He would have preferred a more positive formulation. The case of fire on the ship, provided for by paragraph 3 (f) should definitely be exempt from liability since it was one of the events that could not be foreseen by the carrier.

7. **The Chairperson** reminded the Commission that the text proposed by the Working Group was the result of a compromise achieved at the end of long and difficult debate and that it had the support of a broad majority.

8. **Ms. Sobrinho** (Observer for Angola) recalled that it had been decided, in the absence of a consensus,

to hold informal consultations to reconsider draft article 12, and wondered whether a similar approach might be taken to draft article 18. In its current wording, it would lead to higher prices for goods in developing countries and thus run counter to the global efforts called for by the General Assembly in support of the Millennium Development Goals, in particular that of poverty reduction. She referred notably to paragraph 68 of the 2005 World Summit Outcome, set forth in General Assembly resolution 60/1, on meeting the special needs of Africa. If draft article 18 were approved in its current wording, her delegation would exercise its right of reservation.

9. **The Chairperson** said that he had called for informal consultations on draft article 12 because he had been unable to identify a prevailing opinion. That was not the case in regard to draft article 18: according to his calculations, there was a two-to-one majority in favour of the proposed wording.

10. **Mr.** Amadou Kane **Diallo** (Senegal) stressed that it was important for the Commission to take into account the views of the African States and the members of the Arab League with respect to draft article 18 in order for an acceptable consensus decision to be reached. According to his calculations, there was not an overwhelming majority in favour of the current wording. In fact, at least 15 delegations had called for the deletion of the draft article.

11. **Mr. Egbadon** (Nigeria) said that equity and fairness should not be sacrificed to the need for a timely decision on draft article 18, which was a central part of the draft convention as a whole. The Commission should therefore ensure that the necessary efforts were made to address draft article 18 in a manner that was satisfactory to all. Otherwise the Commission might give the misleading impression that the views of the entire African continent, the Arab League and some major European countries were not considered to be important. In order to build a consensus, he proposed that informal consultations should be held to review draft article 18.

12. **Ms. Czerwenka** (Germany) agreed that it was important to draw up a draft convention that was acceptable to all delegations. For that reason, those delegations that had expressed concerns about draft article 18 should have an opportunity to try to find a consensus solution in informal consultations. She therefore supported the proposal just made by the delegation of Nigeria.

13. **Mr. Delebecque** (France) pointed out that while informal consultations might prove useful, it would be difficult to discuss draft article 18 in isolation, since it was part of a compromise with widespread implications for other provisions, including limits of liability, reservations and the wording of draft article 27.

14. **Mr.** Ibrahima Khalil **Diallo** (Senegal) said that his delegation did not agree with the views just expressed by the delegation of France. Informal consultations on draft article 18 could be limited to that particular issue. Draft article 62 on limits of liability, for example, was an entirely separate matter and would not be called into question.

15. **Mr. Ngoy Kasongo** (Observer for the Democratic Republic of the Congo) agreed that it would be extremely dangerous to reopen the compromise package already agreed upon in Vienna. Informal consultations could focus on the specific proposal made by a group of African States in paragraph 12 of their joint comments (A/CN.9/658/Add.1).

16. **Mr. Tsantzalos** (Greece) said that his delegation was in favour of retaining the current wording of draft article 18, which represented a fair and balanced compromise solution. Reopening the discussion of the draft article would only create further complications.

17. **Ms. Carlson** (United States of America) said that her delegation was in favour of retaining draft article 18 in its current form. Every effort had already been made to achieve an acceptable compromise solution. The proposed informal consultations would merely reopen the debate on a number of contentious issues, which could even jeopardize the outcome of the draft convention itself.

18. **Mr. Hu** Zhengliang (China) said that draft article 18 was part of a compromise package on the carrier's liability, and it would therefore not be appropriate to consider it in isolation. If informal consultations were held, they should cover the whole compromise package concerned with the carrier's responsibility, especially the limits of liability of the carrier.

19. **Mr. Imorou** (Benin) pointed out that the maritime industry had evolved considerably since the Hague Rules of 1924. It seemed odd to base arguments for the present draft convention on such a model.

Africa was not one State but many independent States whose concerns must be respected and taken into account. If the Commission failed to adopt that approach, the convention might never be ratified.

20. **The Chairperson** recalled that the total number of delegations opposed to the retention of draft article 18 was still in the minority.

21. **Mr. Moulopo** (Observer for the Congo) said that the Commission should allow concerned delegations to review the provisions of draft article 18 informally in a spirit of compromise and in an effort to achieve a consensus on a fair and balanced basis. The maritime industry had indeed changed significantly since 1924, but draft article 18 took no account of those developments. As a result, the current text would adversely affect the shipper, leading to higher insurance premiums that would increase the price of the goods. Those costs would ultimately be passed on to the final consumer. The draft text was therefore out of step with the national campaigns of African countries to combat poverty and to achieve the Millennium Development Goals.

22. **Ms. Downing** (Australia) stressed that the Commission had a mandate to produce harmonized international trade law. To that end, her delegation supported the proposal to hold informal consultations on draft article 18 in order to reach a compromise solution.

23. **Mr. Kim** Bong-hyun (Republic of Korea) said that, while his delegation was not completely satisfied with the wording of draft article 18, it was willing to support its retention in a spirit of compromise. His delegation was opposed to holding informal consultations on draft article 18 since it did not wish to reopen the debate on that issue.

24. **Mr. Schelin** (Observer for Sweden) said that his delegation supported the text of draft article 18 as a compromise solution. While the wording of the draft article was not entirely satisfactory, progress had been made compared with the Hague-Visby Rules: the nautical fault exception had been eliminated; half of the fire exception had been eliminated; and it had become clear that paragraph 3 of draft article 18 did not represent exonerations but rebuttable presumptions of the absence of fault. However, since draft article 18 was part of a delicate series of compromises, informal consultations, if conducted, should not be limited to a review of the draft article in isolation.

25. **Mr. Sharma** (India) said that his delegation favoured the retention of draft article 18 in its entirety. However, if informal consultations were to be held, they should address draft article 18 exclusively, without the added complications associated with limits of liability.

26. **The Chairperson** said that, notwithstanding the strength of the arguments put forward, notably by the African States and Egypt, the fact remained that the majority of the members of the Commission wished to retain draft article 18 in its entirety. He took it that the Commission accepted the amendment proposed by Japan and Sweden to eliminate the brackets in paragraph 5 (a) (iii) and to replace "including" by "and" in order to align the provision with article 15, subparagraph (c), as amended.

27. *Draft article 18 was approved in substance, with the amendment proposed by Japan and Sweden, and referred to the drafting group.*

The meeting was suspended at 11.30 a.m. and resumed at noon.

Draft article 19 (Liability of the carrier for other persons)

28. *Draft article 19 was approved in substance and referred to the drafting group.*

Draft article 20 (Liability of maritime performing parties) and definitions of "performing party" and "maritime performing party"

29. **Ms. Czerwenka** (Germany) drew attention to the comments of her Government regarding draft article 20 (A/CN.9/658/Add.11, para. 9). Her delegation also had concerns about the definition of "maritime performing party" contained in draft article 1, paragraph 7. The first problem that arose was how to interpret the term "port". From her reading of the definition in draft article 1, paragraph 7, an inland carrier became a maritime performing party once it entered the port, but further clarification of that definition would be helpful. It was also not clear who was responsible for proving where damage had occurred. A provision was needed which gave States with concerns regarding "maritime plus" contracts the flexibility to opt out.

30. **The Chairperson** said that the word "only" in the last sentence of the definition should meet the concerns expressed by the representative of Germany.

31. **Mr. Sato** (Japan) explained that a road carrier that started and ended its journey outside the port area was never a maritime performing party. A land carrier would be a maritime performing party only if it operated exclusively within the port area: for example, a trucker who transported goods between terminals within the port. However, the ambiguity in the definition could perhaps be clarified.

32. **Mr. Miller** (United States of America) said that countries which had ratified the Hamburg Rules had been living with the ambiguity in the definition of the port area for some time. As it was difficult to define the boundaries of a port in the abstract, the Hamburg Rules allowed local port authorities to define the boundaries, and it would be best for the draft convention to leave that issue to be decided country by country. His delegation supported the current text of draft article 20 and the related definitions.

33. **Mr. Elsayed** (Egypt) said that draft article 20, paragraph 2, related to draft article 13, which his delegation had preferred to delete. It was impossible to conceive of a maritime performing party as being exempt from liability.

34. *Draft article 20 and draft article 1, paragraphs 6 and 7, were approved in substance and referred to the drafting group.*

Draft article 21 (Joint and several liability)

35. *Draft article 21 was approved in substance and referred to the drafting group.*

Draft article 22 (Delay)

36. **Ms. Czerwenka** (Germany) said that Working Group III (Transport Law) had debated at length whether agreement must be explicit or could be implied. Since, as drafted, the article contained no explicit reference to an express agreement, she inferred that either an express or an implied agreement was acceptable.

37. **Mr. Mayer** (Switzerland) said that his delegation interrupted the draft article in the same way.

38. **Ms. Downing** (Australia) said that, since the draft article would change the law in Australia dramatically and amount to a reduction of rights of cargo interests, her delegation had always favoured its deletion.

39. **Ms. Slettemoen** (Norway) said that her delegation had also favoured deletion of the draft article but would accept the compromise text on the understanding that carriers could not contract out of their general obligation in respect of delay and that the provision applied without express agreement.

40. **Ms. Peer** (Austria) said that her delegation supported the inclusion of the article as it was drafted, with the interpretation expressed by the representatives of Germany and Switzerland.

41. *Draft article 22 was approved in substance and referred to the drafting group.*

Draft article 23 (Calculation of compensation)

42. **Mr. Elsayed** (Egypt) said that his delegation would like to insert a provision between paragraphs 2 and 3 to the effect that, if there were no goods of the same kind and quality at the place of delivery, a competent court would determine the amount of compensation.

43. **Mr. Morán Bovio** (Spain) said that, in his view, the convention would not be the best place to resolve that question, as arbitration tribunals in most countries established compensation. In most cases, the question would be resolved under domestic law, an area which the convention was not intended to address.

44. *Draft article 23 was approved in substance and referred to the drafting group.*

Draft article 24 (Notice in case of loss, damage or delay)

45. *Draft article 24 was approved in substance and referred to the drafting group.*

46. *Draft article 25 was approved in substance and referred to the drafting group.*

Draft article 26 (Deck cargo on ships) and definitions of "goods", "ship" and "container"

47. **Mr. van der Ziel** (Observer for the Netherlands) said that draft article 26, which extended the normal liability rules to deck cargo, was an essential element of the balance of risk as expressed in the convention. In restricting the freedom of the carrier to carry goods on deck, the article represented an improvement upon the situation under the Hague Rules, which did not cover deck cargo and had therefore allowed carriers to

exonerate themselves of liability in most cases. Draft article 26 shifted the balance in favour of the interests of the shipper.

48. **Mr.** Ibrahima Khalil **Diallo** (Senegal) noted that, although progress had been made on the issue of balance between shipper and carrier interests since the Hague Rules, the shipper's contractual situation under draft article 26 and that under the Hamburg Rules were essentially the same. If anything, the trend in that respect favoured the interests of the carrier: the Hamburg Rules allowed for notice of damage to be given to the carrier within 15 consecutive days after the date of delivery , whereas the draft convention in draft article 24, paragraph 1, limited the notification period to seven days.

49. **Mr. Hu** Zhengliang (China) said that his delegation had no objections to the substance of the text but thought that the reference to the "customs usages and practices of the trade" should be standardized in word order wherever it appeared in the draft convention.

50. **Mr. Morán Bovio** (Spain) said that, in the interest of legal common sense, differences in historical context must be taken into account when comparing the provisions of legal instruments such as the 1978 Hamburg Rules, the current draft convention and other earlier legal documents. It was obvious that in 1978 a message had taken longer to send than in the current era of electronic communications, hence the longer period of time granted for notification of damage under the Hamburg Rules.

51. **Mr.** Ibrahima Khalil **Diallo** (Senegal) said that it was untenable for some delegations to defend a series of outdated and unjustifiable provisions of the Hague Rules, which were nearly a century old, when it was expedient, while dismissing inconvenient comparisons to the Hamburg Rules as invalid because they were three decades old. Rather than pursuing such contentious debates, the focus should remain on making progress that favoured both carrier and shipper interests.

52. **The Chairperson** noted that the definitions of "goods", "ship" and "container" contained in draft article 1, paragraphs 24, 25 and 26, were related to draft article 26.

53. **Mr. van der Ziel** (Observer for the Netherlands) asked whether the term "container" in the definition of "goods" should be supplemented by "road and rail cargo vehicle", as per the proposal made by his delegation in its comments (A/CN.9/658/Add.9, para. 9).

54. **Mr. Mollmann** (Observer for Denmark) and **Mr. Sharma** (India) agreed that adding a reference to "road and rail cargo vehicles" was appropriate in draft article 1, paragraph 24.

55. **Mr. Schelin** (Observer for Sweden) said that including a reference to "road and rail cargo vehicles" in the definition of "goods" would cause some confusion. The definition of "goods" already covered "articles of every kind whatsoever", making an explicit mention of road and rail cargo vehicles unnecessary. Moreover, draft article 61, paragraph 2, referred to containers and road or railroad cargo vehicles as things that goods were carried in or on.

56. **The Chairperson** said that, given the divergent views on the proposed amendment, he took it that the Commission wished to retain the current wording of the definition of "goods". The drafting group would be asked to ensure consistency in references to "customs, usages and practices of the trade".

57. *Draft article 26 and draft article 1, paragraphs 24, 25 and 26 were approved in substance and referred to the drafting group.*

The meeting rose at 1 p.m.

United Nations A/CN.9/SR.870

General Assembly

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United Nations Commission on International Trade Law

Forty-first session

Summary record of the 870th meeting
Held at Headquarters, New York, on Wednesday, 18 June 2008, at 3 p.m.

Chairperson: Mr. Illescas ..... (Spain)

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08-39404 (E)

The meeting was called to order at 3.15 p.m.

Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea (*continued*) (A/CN.9/642, A/CN.9/645 and A/CN.9/658 and Add.1-13)

Draft article 27 (*Carriage preceding or subsequent to sea carriage*)

1. **Ms. Downing** (Australia), referring to her Government's written comments (A/CN.9/658, paras. 41-42), said that, as currently worded, draft article 27 imposed on shippers the nearly impossible burden of proving where damage or loss had occurred before its provisions could have any practical effect. Furthermore, unless a reference to national law was inserted, her own Government and others would have difficulty regulating inland carriers under draft article 27.

2. **Ms. Halde** (Canada) said that her delegation had long argued for the inclusion of a reference to national law to ensure that the maritime limitations established by draft article 27 would not have any impact on the land portion of a transport and to ensure that national limitations on inland carriers were preserved. An acceptable alternative would be to allow States parties to formulate a reservation to the convention to that effect. While aware that the concept of the maritime performing party could cover the land transportation issue, Canadian industry had expressed major concerns over the potential ambiguity and resultant misapplication of the draft convention to inland carriers.

3. **Mr. Hu** Zhengliang (China), supporting the Australian position, observed that the situation in China was similar, because China was not a party to the Convention on the Contract for the International Carriage of Goods by Road (CMR) or the Convention concerning International Carriage by Rail (COTIF). His delegation had consistently advocated the inclusion of a reference to national law in draft article 27.

4. **Ms. Eriksson** (Observer for Finland) said that, while her Government favoured having the draft convention cover door-to-door transport, it was concerned about the rules for multimodal transport in draft article 27 and agreed that it should include a reference to national law.

5. Another major problem had to do with non-localized damages. The maritime rules would apply to the land transport leg if the shipper could not prove that the damage had occurred during transport by a mode other than by sea, which was extremely difficult to do, especially in the case of containers. Global harmonized rules for shipping were necessary, but the different worldwide trade and transport patterns must be recognized. In Europe, land transport conventions were applied with significantly higher limitation amounts than were currently stipulated in the draft convention. Unfortunately the special rule on limits of liability for non-localized damage had been eliminated from the draft, so that there was a clear link between draft article 27 and draft article 61; the low limits set in the latter compounded the problem in the case of non-localized damage. To address the different multimodal transport situations worldwide and attract as many signatories as possible to the convention, an arrangement was needed to regulate the multimodal liability aspects in a way that was fair to both shipper and carrier. That could be done via a reservation clause.

6. **Mr. Elsayed** (Egypt) proposed that, since draft articles 27 and 12 both dealt with the period of responsibility of the carrier, draft article 27 should be deleted and the text combined with that of draft article 12.

7. **Mr. Sharma** (India), concurring with Australia on the need to include a reference to national law, observed that the Asian countries were not parties to regional conventions like CMR. A reference to national law would also serve to clear up any ambiguity about the applicability of the limits of liability in the draft Convention. The understanding in Working Group III (Transport Law) had been that the Convention would apply where there was no applicable international instrument but would yield to another applicable international instrument.

8. **Mr. Schelin** (Observer for Sweden) said that his delegation shared Finland's concerns and believed the Commission should seek to approve a text acceptable to the large majority of States, which meant a compromise text. A number of States required a reservation to draft article 27, and the limitation amounts would also be an important issue. Compromise could be achieved and Sweden was willing to join the discussion.

9. **Ms. Czerwenka** (Germany), referring to her Government's written comments (A/CN.9/638/Add.11, paras. 3-5 and 11-12), said that her delegation supported the reintroduction of a reference to national law. In any case, draft article 27 was no longer very important in the scheme of the draft convention, because the Working Group had deleted the provision on the limits that would apply in cases of non-localized damage, which meant that the relatively low limits of liability set in draft article 61 would apply in most cases. A compromise must be reached on draft article 27, and one solution would be to include a reservation clause regarding "maritime plus" contracts.

10. In addition, since the Working Group had concluded that draft article 27 was not a conflict of conventions provision, the statement in the chapeau that the convention did not "prevail" was misleading. Rather, there should be wording to the effect that the convention did not "apply" in the cases set out in subparagraphs (a) to (c).

11. **Mr. Miller** (United States of America) said that draft article 27 was already part of a compromise proposed by more than thirty countries and supported by others. There was therefore no need for a new compromise. Many delegations, including his own, had refrained from insisting on the inclusion of preferred positions in the interests of general consensus on the text. It was not appropriate at the current stage to insert a reference to national law or to introduce a reservation clause.

12. He had been astonished to hear the limits of liability under the draft Convention described as low: for packaged goods they were much higher than under other carriage regimes like CMR or COTIF.

13. **Mr. Berlingieri** (Italy), concurring with the United States, said that his delegation could not support the proposals for a reference to national law in draft article 27. All certainty about the scope of the convention would disappear, because the provisions of the different national transport laws were not known the world over, and could be changed at any time by States, leaving both carriers and shippers unclear as to what rules applied to the contracts they had concluded.

14. On the question of non-localized damage, it was reasonable to adopt the rule that unless there was proof that loss or damage had occurred elsewhere, it would be deemed to have occurred on the sea leg of the transport because draft article 27 covered "maritime plus" contracts in which the maritime section was the fundamental leg that triggered the applicability of the convention in the first place.

15. **Ms. Slettemoen** (Norway) said that her delegation would have preferred a reference to national law but agreed with the United States that the draft text as it stood represented a compromise. However, the possibility of coming back to draft article 27 might be left open if other parts of the compromise were altered later in connection with other provisions. As to the German suggestion to change "prevail" to "apply", article 30 of the Vienna Convention on the Law of Treaties used the word "prevail", and it should be retained in the draft convention as well.

16. **Mr. Blake-Lawson** (United Kingdom), **Mr. Delebecque** (France), **Mr. Alba Fernández** (Spain), **Mr. Tsantzalos** (Greece) and **Mr. Sandoval** (Chile) said that the current text of draft article 27 should be retained.

17. **Mr. Elsayed** (Egypt) said that he supported the proposal of Australia and Finland to refer to national law. The non-maritime leg of a contract should be covered by national law, and the draft convention should apply only to the maritime leg, because a shipper had no way of knowing where damage had occurred.

18. **Mr. Mayer** (Switzerland), agreeing that the text of article 27 should be retained as it stood, said that he would, however, support Germany's proposal to find wording other than "do not prevail", because draft article 27 was not a conflict of conventions clause but reflected a network approach and could not be compared to the Vienna Convention.

19. **Mr. van der Ziel** (Observer for the Netherlands) said that article 27 was already a compromise text, and the Commission should adhere to the compromise. As to the German proposal, he believed that the phrase "do not prevail" was the correct one. The draft convention and other international conventions must be read in the context of different liability regimes, but the draft convention in principal prevailed unless there were conflicting provisions in one of the other applicable conventions.

20. **Mr. Shautsou** (Belarus) said that his delegation favoured retaining the agreed compromise text of draft article 27. The phrase "do not prevail" was the correct wording because it allowed individual provisions of the

draft convention to apply where there was no conflict. As Italy had argued, a reservation clause regarding national legislation would affect the stability of the draft convention and should not be introduced.

21. **Mr. Sato** (Japan) said that his delegation agreed with all those who supported retaining the draft article in its current form, as it represented a compromise. He had no firm views on whether the draft article embodied a conflict of conventions or a network approach, but felt that "prevail" was the right term. The draft article as it stood enabled a court to give preference to other conventions that applied to the limited situation described in the article but did not prevent it from giving preference to the draft convention if it saw fit.

22. **Ms. Czerwenka** (Germany) said that the reason for changing "prevail" to "apply" was to make it clear that draft article 27 was not a conflict of conventions provision. Provided it was known where the damage had occurred and provided it had occurred where another international instrument applied, the provisions of the latter instrument would apply.

23. **The Chairperson** said that there appeared not to be a majority in favour of including a right of reservation or a reference to national law. With regard to the choice of verb between "prevail" and "apply", the drafting group could decide.

24. *Draft article 27 was approved in substance and referred to the drafting group.*

Draft articles 28 (Delivery for carriage), 29 (Cooperation of the shipper and the carrier in providing information and instructions), 30 (Shipper's obligation to provide information, instructions and documents) and 31 (Basis of the shipper's liability to the carrier)

25. *Draft articles 28, 29, 30 and 31 were approved in substance and referred to the drafting group.*

Draft article 32 (Information for compilation of contract particulars) and definition of "contract particulars"

26. **Ms. Czerwenka** (Germany) noted that, as her delegation had pointed out in its written comments (A/CN.9/658/Add.11, paras. 13-14), the shipper was subject to strict liability if the information it was obliged to provide under draft articles 32 and 33 was inaccurate. Moreover, under draft article 81 the shipper's liability could not be limited, whereas under draft article 61 the carrier enjoyed limited liability for all breaches of its obligations. The liability regime was thus unbalanced to the detriment of the shipper. Her delegation would therefore propose deleting the verb "limits" in draft article 81, paragraph 2, in order to allow the parties to agree contractually to a limitation of the shipper's liability.

27. **Mr. Miller** (United States of America) recalled that the Working Group, after much discussion, had concluded that there was no practical way to limit the shipper's liability. Although it might be appropriate in certain cases for the parties to agree contractually to different terms, that was provided for in draft article 82 on special rules for volume contracts. There was no need to change draft articles 32 and 33 or draft article 81.

28. **Ms. Peer** (Austria) said her delegation agreed that there was currently an imbalance between shipper and carrier interests, and it supported the proposed change.

29. **Ms. Downing** (Australia) said that her delegation supported the German proposal. As it had indicated in its written comments (A/CN.9/658, para. 8), Australia had some concerns about the balance of interests in the draft convention. Although it was difficult to set an appropriate general cap on the shipper's liability, the shipper should have the freedom to seek to limit its liability contractually, for example, to the amount of insurance it was able to obtain.

30. **Mr. Schelin** (Observer for Sweden) said that his delegation saw merit in the German proposal, which could benefit both parties because it would make it easier for the shipper to insure its liability. A shipper's general liability insurance policy might not cover the risks described in draft articles 32 and 33, and in any case insurance companies were generally unwilling to insure unlimited liability.

31. **Mr. van der Ziel** (Observer for the Netherlands) said he assumed that Germany's aim was to allow the shipper to negotiate a monetary limit on its liability. The issue of capping the shipper's liability had been discussed, and the current solution was part and parcel of the compromise. His delegation would not be in favour of reopening the whole package.

32. **Mr. Kim** In Hyeon (Republic of Korea) said that his delegation associated itself with the statement by the representative of the United States and preferred to leave draft article 81 unchanged. In fact, the Working Group had not been able to find any practical way to set a limit on the shipper's liability.

33. **Ms. Talbot** (Observer for New Zealand) said that her delegation supported the comments of Austria and Sweden.

34. **Mr. Sato** (Japan) said that, although his delegation had not favoured a mandatory rule on shipper's liability, it had some sympathy for the German proposal. However, the proposed change to draft article 81, paragraph 2, would affect not only the obligations under draft article 32 but also the shipper's obligations of disclosure relating to dangerous goods under draft article 33, and perhaps no limitation of those obligations should be allowed. If the question were reopened, the Commission should be very careful about the scope of freedom of contract. Although his delegation tended to prefer to maintain the compromise solution and retain the current wording of draft article 81, it could consider a more limited amendment.

35. **Mr. Mayer** (Switzerland) expressed support for the German proposal and said that he had no recollection of draft article 81, paragraph 2, being part of a compromise.

36. **Ms. Czerwenka** (Germany), responding to the Netherlands, again argued that under draft article 81, paragraph 2, it was not currently possible for the parties to limit the shipper's obligations and hence liability contractually. That was unfair, since draft article 61 set specific limits on the carrier's liability for all breaches of its obligations. The issue related not only to draft article 32, but also to draft article 33. Her delegation was simply trying to strike a better balance, but was, of course, open to compromise.

37. In that connection, she was puzzled by some delegations' reference to an earlier compromise. The Working Group had indeed approved a text, but it was the Commission's task to review it. It was a matter of finding a balanced text that was acceptable to most delegations, not of reopening issues or questioning compromises that might have been agreed by some, but not all, delegations in the Working Group.

38. **Mr. Mollmann** (Observer for Denmark) said that two different issues were being discussed. With regard to the introduction of a general limitation on the shipper's liability, the representative of the United States was correct in saying that it would be very difficult for the Commission to agree on a rule. With regard to the possibility of contracting on terms other than those set out in the Convention, his delegation agreed that the Convention was currently unbalanced; however, it was unbalanced not in favour of the carrier, as the German delegation argued, but in favour of the shipper. Indeed, draft article 81, paragraph 2, subparagraph (a), prevented the parties from contracting on terms that increased the shipper's obligations; nothing, however, prevented the parties from contracting on terms that increased the carrier's obligations. His delegation had accepted that situation in earlier discussions but was opposed to making the Convention even more unbalanced by allowing the parties to the contract to limit the shipper's obligations. The current version of the text should, therefore, be retained.

39. **Mr. Morán Bovio** (Spain) said that his delegation failed to understand why draft article 32 raised so many concerns. The only obligation it placed on the shipper was to provide, in a timely manner, the information required for the compilation of the contract particulars and the issuance of the transport documents or electronic transport records. Without such information, those documents or records could not be issued and the goods could not be transported. The current version of draft article 32 should, therefore, be retained.

40. **Mr. Sharma** (India) said that his delegation had no problem with draft article 32. With regard to draft article 81, he recalled that, during its discussions regarding the liability of the carrier, the Working Group had agreed that there was no practical way of setting specific limits on the liability of the shipper. However, the German proposal to delete the word "limits" simply allowed the parties to decide that matter contractually and would not affect the compromise. His delegation was, therefore, sympathetic to the proposal.

41. **Ms. Slettemoen** (Norway) said that her delegation agreed with the Dutch delegation that simply deleting the word "limits" was not the best solution. Any amendment should deal more specifically with the limits of liability.

42. **Mr. van der Ziel** (Observer for the Netherlands) confessed that he had understood the German proposal to relate only to the possibility of placing a monetary cap on the shipper's liability; he now realized that it also related to obligations of a non-monetary nature, which was another matter altogether. The obligations set out in draft articles 30, 32 and 33 related not only to contractual relations, but also to safety and the proper performance of the transport itself. Therefore, while the part of the proposal relating to liability might be open to compromise, the part relating to obligations was unacceptable to his delegation, for the reasons set out by the representative of Spain.

43. **Ms. Halde** (Canada) said that her delegation agreed with Germany that the shipper should be able to limit its liability through contractual arrangement.

44. **Mr. Delebecque** (France) said that his delegation had no problem with draft article 32. With regard to draft article 81, it was open to the idea of allowing the parties to limit the liability of the shipper contractually, but only in relation to certain obligations — the shipper's liability in relation to obligations relating to dangerous goods, for example, should not be limited — and only where the breach was due neither to wilful misconduct nor to gross negligence.

45. **Ms. Slettemoen** (Norway) said that, like the Netherlands, her delegation supported the German proposal with regard to the shipper's liability, but not with regard to the shipper's obligations in general.

46. **Ms. Czerwenka** (Germany) explained that her delegation's intention was only to allow for contractual limitation of the shipper's monetary liability, not its substantive obligations.

47. **The Chairperson** said that since draft article 81 was not yet under consideration, the German delegation still had time to refine its proposal, taking into account the concerns raised. He took it that the Commission wished to approve draft article 32 and, in the absence of any comments, the related definition of "contract particulars" contained in draft article 1, paragraph 23.

48. *Draft article 32 and draft article 1, paragraph 23, were approved in substance and referred to the drafting group.*

The meeting was suspended at 4.45 p.m. and resumed at 5.25 p.m.

49. **The Chairperson** informed the Commission that, following consultations between the delegation of Germany and the secretariat, it had been decided that the current wording of draft article 27 could be retained so that the drafting group would not need to decide between the "prevail" and "apply".

50. **Mr. Sekolec** (Secretary of the Commission) explained that, once approved, the draft convention would be reproduced in annex to the report of the Commission on the work of its forty-first session. The Sixth Committee would consider that report at the sixty-third session of the General Assembly and would prepare a draft resolution for adoption by the Assembly, adopting the draft convention and opening it for signature. It was the Commission's practice to request the General Assembly to open such instruments for signature without substantial renegotiation since the Assembly, as a political body, was not competent to consider it in detail. Draft instruments could also be adopted at a diplomatic conference. However, in addition to the budgetary implications that such an approach would entail, the draft convention was very long; at least three weeks would be needed if the participants were to vote separately on each article, and the result would be unpredictable. Several recent international conventions had been negotiated entirely in the Commission, and the General Assembly had demonstrated its confidence in the Commission's technical knowledge and political wisdom by opening those instruments for signature without further negotiation; he thought it likely that that practice would be followed in the case at hand.

Draft article 33 (Special rules on dangerous goods)

51. *Draft article 33 was approved in substance and referred to the drafting group.*

Draft article 34 (Assumption of shipper's rights and obligations by the documentary shipper) and definitions of "documentary shipper"

52. **The Chairperson** noted that the definition of "documentary shipper" contained in draft article 1, paragraph 9, was relevant to the content of draft article 34.

53. **Ms. Czerwenka** (Germany), drawing attention to her delegation's written comments (A/CN.9/658/Add.11, para. 15), said that the draft article went too far by making the documentary shipper subject to all the

obligations and liabilities imposed on the shipper and, apparently, establishing their joint and several liability. In draft article 1, paragraph 9, it was not clear in practice which party had the burden of proving that the documentary shipper had accepted to be named as "shipper".

54. **Mr. Schelin** (Observer for Sweden) said it seemed reasonable that documentary shippers should bear some responsibility when they substituted for the shipper; that was particularly true if they were responsible for the loading of the ship. However, he did not think that any joint liability was implied.

55. *Draft article 34 and draft article 1, paragraph 9, were approved in substance and referred to the drafting group.*

Draft article 35 (Liability of the shipper for other persons)

56. *Draft article 35 was approved in substance and referred to the drafting group.*

Draft article 36 (Cessation of shipper's liability)

57. **Ms. Downing** (Australia), drawing attention to her delegation's written comments (A/CN.9/658, paras. 46-47), said that draft article 36 should be deleted. It was at odds with the freedom of contract provisions elsewhere in the draft convention and established an imbalance to the detriment of the shipper, since the parties would not be free to put a time limit on when the shipper's liability would cease.

58. **Ms. Halde** (Canada) said that her delegation agreed with the representative of Australia; the draft article appeared to create never-ending liability for the shipper, which was contrary to draft article 64 (period of time for suit); either it should be deleted, or a provision linking it to draft article 64 should be included in order to make it clear that the latter article would apply to all claims.

59. **Mr. Sandoval** (Chile) suggested that for linguistic reasons, the words "*carecerá de efecto alguno*" should be changed to "*no producirá efecto ninguno*" in the Spanish text of the draft article.

60. **Ms. Peer** (Austria) said that her delegation agreed with the proposal to delete draft article 36.

61. **Mr. Lebedev** (Russian Federation), supported by **Ms. Slettemoen** (Norway), pointed out that paragraphs 107 and 108 of the report of Working Group III (Transport Law) on the work of its twenty-first session (A/CN.9/645) did not provide a rationale for the inclusion of draft article 36. The provision appeared superfluous, but he would be interested to know whether an explanation of its function appeared in an earlier report of the Working Group.

62. **Mr. Schelin** (Observer for Sweden) recalled that in the past, some members of the Working Group had argued that the draft article was needed. He had never understood the rationale and agreed that it should be deleted; it might lead to confusion in the context of draft article 81, which also covered derogation from the shipper's liability. Moreover, if the Commission should decide that it wished to allow the parties to a contract to set a cap on the shipper's liability, draft article 36 would be in direct contradiction to that freedom of contract.

63. **Mr. Imorou** (Benin), **Mr. Elsayed** (Egypt), **Ms. Czerwenka** (Germany), **Mr. Sharma** (India) and **Ms. Talbot** (Observer for New Zealand) said that they associated themselves with the delegations that had called for the deletion of draft article 36.

64. **Mr. Shautsou** (Belarus) suggested that the draft article might be useful in the context of the economic implications of the shipper's liability.

65. **The Chairperson** said it appeared that the majority of the Commission's members wished to delete the draft article.

66. *Draft article 36 was deleted.*

The meeting rose at 6 p.m.

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Summary record of the 871st meeting
Held at Headquarters, New York, on Thursday, 19 June 2008, at 10 a.m.

Chairperson: Mr. Illescas (Spain)

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Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea (*continued*)

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08-39380 (E)

The meeting was called to order at 10.10 a.m.

Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea (*continued*) (A/CN.9/642, A/CN.9/645 and A/CN.9/658 and Add.1-13)

Draft article 37 (Issuance of the transport document or the electronic transport record)

1. *Draft article 37 was approved in substance and referred to the drafting group.*

Draft article 38 (Contract particulars)

2. **Mr.** Ibrahima Khalil **Diallo** (Senegal), referring to the proposed version of draft article 38 contained in the written comments by a group of African States (A/CN.9/658/Add.1, para. 15), called for the inclusion of additional information, specifically, the name of the consignee, the name of the ship, the ports of loading and unloading and the approximate date of delivery, in the list of contract particulars in draft article 38. Such information was essential for the performance of the contract.

3. **Mr. Elsayed** (Egypt) endorsed the proposal made by the representative of Senegal and stressed the need for providing details such as the place and date of issuance of the transport document, the name and address of the carrier, the value of the goods, the place of delivery of goods, a sufficient description of potentially dangerous goods and the number of originals of the document.

4. **Mr. Imorou** (Benin) said that his delegation firmly supported the proposal made by the representative of Senegal. As primarily a shipping country, Benin thought the additional information to be essential. Without knowing particulars such as the name of the ship, where the goods were loaded and the approximate date of arrival, the shipper could not take the necessary action and should therefore be provided with all relevant information.

5. **Ms. Wakarima Karigithu** (Kenya) endorsed the proposals made by the representatives of Senegal, Benin and Egypt.

6. **Ms. Malanda** (Observer for the Congo) said that her delegation also supported the addition of the particulars proposed by the representative of Senegal. She did not understand the reasons for omitting such basic information, which had been included in previous drafts until the tenth session of the Working Group.

7. **Mr. Ndzibe** (Gabon), **Mr. Lavambano** (Observer for Angola) and **Mr. Ousseimi** (Observer for the Niger) also supported the proposal presented by the representative of Senegal and contained in the joint written comments of a group of African States (A/CN.9/658/Add.1, para. 15).

8. **Mr. van der Ziel** (Observer for the Netherlands) explained that draft article 38 included only the mandatory particulars and allowed the commercial parties to agree on which additional particulars should be included in the transport document. In many cases, particulars such as the name of the ship, the name and address of the consignee, the ports of loading and unloading and the approximate date of delivery were simply not available at the moment of issuance of the transport document. For instance, in a multimodal transport contract the name of a ship onto which goods would be loaded after carriage from an initial inland point — which could take days — might not be known in advance, and even the ports used might be left to the carrier's discretion. Similarly, the name of the consignee was not considered mandatory, because the identity of the eventual buyer was sometimes unknown at the time the transport document was issued. With regard to the date of delivery, though estimates and notices of arrival to the consignee were customary in the maritime industry, it would be going too far to require inclusion of that information in the transport document. Furthermore, the shipper was under pressure to obtain a transport document as early as possible to present to the bank in order to obtain the purchase price; therefore, early issuance of the transport document was in the interest of the shipper.

9. **Ms. Czerwenka** (Germany) thanked the representative of the Netherlands for his explanation and requested further clarification of the idea that the contract particulars listed in article 38 were mandatory. She wondered whether inaccurate or missing information would render a transport document null and void.

10. **The Chairperson** said that draft article 41 might address the concern expressed by the representative of Germany.

11. **Mr. Ngoy Kasongo** (Observer for the Democratic Republic of the Congo) supported the proposal of the African States. Requiring more details relevant to the

goods being shipped — such as the name of the vessel in which the goods were transported, or the ports in which the goods were loaded or discharged — would be a useful supplement to the basic information listed in draft article 38, rendering it more precise.

12. **Mr. Miller** (United States of America) said that the concept underlying draft article 38 was to require information only on those aspects that were absolutely necessary. Many of the additions proposed would be counterproductive, resulting in more expensive transactions for the shipper and undermining the purpose of the draft convention. He found it ironic that delegations that had been defending the interests of shippers would favour provisions that would interfere with those interests in many cases. For the reasons explained by the representative of the Netherlands, his delegation opposed the inclusion of additional requirements in article 38.

13. In response to the questions raised by the representative of Germany, he noted that the items required under draft article 38 were indeed mandatory in a legally enforceable sense, though draft article 41, paragraph 1, preserved the legal validity of the transport document in the event of absence or inaccuracy of one or more of the contract particulars and therefore did not punish the shipper interests for a mistake made by the carrier. However, the draft convention did not purport to regulate all aspects of the contractual relationship between the carrier and the shipper; some aspects would be dealt with by national laws, and many national legal systems did indeed have provisions that governed what would happen if the carrier refused to include information in the document that the shipper had the right to demand. Under article 41, paragraph 3, the draft convention itself provided for the presumption of good order and condition of the goods at the time the carrier or a performing party received them if the contract particulars failed to state otherwise.

14. **Mr. Kim** In Hyeon (Republic of Korea) said that some of the additional particulars suggested in the African proposal were not usually fixed at the moment of issuance of the transport document. Those particulars might be included in the transport document on a voluntary basis, but they should not be covered by draft article 38. His delegation endorsed the views expressed by the representative of the Netherlands and the explanation given by the representative of the United States.

15. **Mr. Sandoval** (Chile) said that he understood that draft article 38 covered only the information that was required to issue the transport document, and his delegation supported the retention of the article as it stood, endorsing the views expressed by the representatives of the Netherlands and the United States. Any other particulars should be provided as part of a prior agreement between the shipper and the carrier.

16. **Mr. Hu** Zhengliang (China) said that the explanation given by the representative of the Netherlands was convincing, since the draft convention was a "maritime plus" convention. When a transport document or an electronic transport record was issued, some particulars were not known to the carrier or to the shipper. He also welcomed the Chairperson's reference to draft article 41, which confirmed that the absence of one or more particulars did not affect the legal validity of the transport document. Such a provision implied that the items listed in draft article 38 were not entirely mandatory. His delegation agreed with the African view to an extent, insofar as the consignee should, upon receipt of a transport document, be informed of the place of delivery of the goods; however, that piece of information did not need to be included in the transport document or the electronic transport record as such.

17. **Mr. Elsayed** (Egypt) said that, as legislators, the members of the Commission should include any elements that would make for greater clarity and precision. Information such as the name of the ship could prove valuable in the event of recourse to arbitration.

18. **Mr. Bigot** (Observer for Côte d'Ivoire) stressed that the omission or inaccuracy of any information that might be required by draft article 38 would not affect the validity of the transport document, as was made clear by draft article 41. The information the African States wished to see added to the list would facilitate trade. Shippers needed to know the place and at least the approximate date of delivery. There was no obvious reason why the inclusion of such information should entail higher costs.

19. **Ms. Traoré** (Observer for Burkina Faso) said that it was important to include the additional elements, especially for shippers in landlocked countries, who would need to have reliable information about ports of transit and delivery dates so as to be able to take

delivery of goods at the right time and in the right place.

20. **Ms. Slettemoen** (Norway), while in favour of the draft text as it stood, suggested, in a spirit of compromise, that the additional elements might be included on an explicitly non-mandatory basis.

21. **Mr. Delebecque** (France) said that the requirement to include further information in transport documents might prove counterproductive. It was not necessary to name the ship in such documents, which related essentially to the goods transported and not to the means used for that purpose. Draft article 22 already provided for the issue of time constraints, which depended on an express or implicit agreement between the parties.

22. **Mr. Sato** (Japan) said that additional particulars, such as the name of the ship and the ports of loading and unloading, would indeed be useful for trade but could only be included if they were known. Failure to provide that information should not be an obstacle to issuance of the transport document, while inclusion of the date of delivery in the list would necessitate some qualification. In view of the detailed and complicated conditions that would have to be introduced to qualify the proposed additions, it might be better to leave the list unchanged. He agreed with the representatives of the United States and China that a failure to meet any of the requirements of the draft article would not necessarily invalidate the transport document. That would depend on national law. The draft convention did not itself spell out the possible consequences of the breach of many of its provisions.

23. **Mr. Sharma** (India) recalled that the list of particulars had been finalized after lengthy discussion. While there was some merit in the proposal by the African States, he accepted the reasoning of the representatives of the Netherlands and the United States. Technically speaking, the requirements of the draft article were not mandatory pursuant to draft article 41, but that was not relevant to the current discussion. One further piece of information that would be useful and had not been mentioned was the place and date of receipt of goods, particularly in the light of draft article 33.

24. **Mr. Berlingieri** (Italy) said that information as to the place and date of receipt did indeed need to be included, since according to draft article 5, it would not be possible in its absence to determine whether the draft convention applied.

25. **Mr. Egbadon** (Nigeria) said that draft article 38 could not be considered in isolation from draft article 41. The requested information need only be supplied if it was available and would not be mandatory.

26. **Mr.** Ibrahima Khalil **Diallo** (Senegal) recalled that the Hamburg Rules adopted in 1978 listed in their article 15 a number of contract requirements that had not been included in the draft convention. It was indeed important for contracts to include all essential information, including the place and date of receipt of goods. While the subject of the contract was not ships but goods, it would be useful for the ships involved in the transport of the goods to be named.

27. **Mr. van der Ziel** (Observer for the Netherlands) said that the Hamburg Rules did indeed contain a longer list of requirements for contract particulars, but the main point on which the draft convention differed was that it called for inclusion of the name and address of the carrier. In 1978, before the development of electronic communication, the transport document had been an essential means of having the necessary data. Nowadays, once the carrier had been identified, it was easy to obtain any information required. As all the larger carriers had websites that offered goods tracking systems, it was no longer so necessary to include such data in transport documents. A further consideration was that for information to be included, it had to be available, and since much of it only became so in the course of the voyage, such a requirement might militate against the early issuance of travel documents. That was particularly true in regard to the place of delivery, as shippers did not always know where goods would finally be unloaded. In addition, the shipper could be a documentary shipper, who might prefer the name of the shipper to remain confidential. As for the place of receipt of goods, since if it were unknown there could be no transport, there was no need to mention it: it was central to any contract of carriage.

28. **Ms. Downing** (Australia) recognized the usefulness of naming the place of receipt and delivery and pointed out, in response to the representative of the Netherlands, that in cases where, for example, the place of delivery was not known, draft article 41 would apply.

29. **Mr. Mollmann** (Observer for Denmark) said that in cases like that cited by the representative of Burkina

Faso, it would be left to the carrier and the shipper to agree on the information to be included in the contract; it would not be practical to make any mandatory provision to that effect. He did not agree with the representative of Australia regarding the applicability of draft article 41, which simply stated that deficiencies in respect of contract particulars would not affect the validity of the transport document. Such deficiencies might have other consequences under national law that would not be alleviated by that draft article.

30. **Ms. Talbot** (Observer for New Zealand) said that it might be useful to hold informal consultations in order to address the suggestions made by the representatives of Norway and Japan.

31. **Ms. Mbeng** (Cameroon) stressed that her country like most African countries was at the receiving end of trade and would therefore find it very useful for the contract particulars to include the name and address of the consignee. That information should be mandatory and should be included in the list of requirements in the draft article.

32. **Mr. Morán Bovio** (Spain) stressed that it was important to bear in mind that the aspects governing the implementation of the contract of carriage, as provided for in draft article 5, were not necessarily contained in the transport document. His delegation would prefer to retain the current text of draft article 38, since the inclusion of additional contract particulars could be problematic.

33. **Ms. Carlson** (United States of America) supported the proposal of the representative of New Zealand that informal consultations should be held to produce a carefully nuanced draft that met the various concerns that had been raised.

34. **Ms. Czerwenka** (Germany) said that the transport document, as defined in draft article 1, paragraph 14 (b), evidenced or contained a contract of carriage. It followed that the key elements should be reflected in the transport document. For that reason, her delegation supported the inclusion of a longer list of contract particulars in draft article 38 and endorsed the proposal of the representative of New Zealand that informal consultations should be held.

35. **Mr. Elsayed** (Egypt) said that his delegation could also support the holding of informal consultations to amend draft article 38. He would urge the group entrusted with that task to ensure that its list of additional contract particulars included the name of the ship.

36. **Mr. Mayer** (Switzerland) said that his delegation could agree to the inclusion of a longer list of contract particulars in draft article 38, provided the necessary qualifications were also included. The parties should not be forced to agree on the ports of loading and unloading, for example, at the time of the issuance of the transport document. Reference to those ports in draft article 38 should therefore be followed by wording such as "if specified by the parties". Similarly, draft article 38 should allow the place of receipt and delivery, if included, to be determined at a later stage by the parties concerned.

37. **Mr.** Ibrahima Khalil **Diallo** (Senegal) reiterated that the additional information that his delegation wished to see included in the contract particulars consisted of the name and address of the consignee, the name of the ship, the ports of loading and unloading and the approximate date of delivery.

38. **Mr. Kim** In Hyeon (Republic of Korea) recalled that draft article 38 was closely related to the evidentiary effect of the contract particulars in draft article 43. In that connection, he noted that the draft convention, unlike the Hague-Visby Rules, allowed additional contract particulars in the transport document other than those referred to in draft article 38 to trigger the evidentiary effect in draft article 43, subparagraphs (a) and (b).

39. **Mr. Sharma** (India) asked that inclusion of place of receipt should also be considered in informal consultations.

40. **Mr.** Ibrahima Khalil **Diallo** (Senegal) noted that a consensus should be possible since a clear majority of the delegations wished to include additions to draft article 38 and to provide such additions with the necessary qualifications. However, if a consensus could not be reached to include all of those elements, he hoped that his delegation's original proposal could be approved as the consensus decision.

41. **The Chairperson** said he took it that the Commission wished to hold informal consultations on draft article 38 to consider not only the proposals of Senegal and Egypt hit also the inclusion of the place and date of receipt and the necessary qualifications.

However, if no comprise solution was reached, draft article 38 would be retained in its current form.

42. *It was so decided.*

The meeting was suspended at 11.55 a.m. and resumed at 12.20 p.m.

Article 39 (Identity of the carrier)

43. **Mr. Elsayed** (Egypt) suggested that paragraph 2 of article 39 should be redrafted in the interests of legal certainty, since it allowed too much leeway for the carrier to evade responsibility.

44. **Mr. Sato** (Japan) said that his delegation was dissatisfied with the text of draft article 39 but, since it was a part of a compromise package, had nevertheless decided to accept it.

45. *Draft article 39 was approved in substance and referred to the drafting group.*

Draft article 40 (Signature)

46. **Ms. Czerwenka** (Germany), drawing attention to her delegation's written comments (A/CN.9/658/Add.11, para. 17), noted that draft article 40, paragraph 2, stipulated that an electronic transport record must include an electronic signature of the carrier and set forth a few requirements. As her delegation interpreted that paragraph, more specific requirements for electronic signatures could be imposed by national law. On that basis, her delegation could accept paragraph 2 of draft article 40.

47. **Ms. Downing** (Australia) said that her delegation could accept draft article 40 on the basis of the interpretation provided by the representative of Germany.

48. **Mr. Sato** (Japan) said that his delegation fully endorsed that interpretation of draft article 40 and would also welcome any further clarification of the draft article.

49. **Ms. Carlson** (United States of America) said that her delegation had the same interpretation as the representative of Germany. That article was one of the places where the language of the draft convention was not exhaustive, and matters not provided for were left for national law to determine.

50. *Draft article 40 was approved in substance and referred to the drafting group.*

Draft article 41 (Deficiencies in contract particulars)

51. **Mr. Imorou** (Benin) suggested that "*erreurs*" or "*omissions*" might be more appropriate than "*lacunes*" in the title of the French version of the text.

52. *Draft article 41 was approved in substance and referred to the drafting group.*

Draft article 42 (Qualifying the information relating to the goods in the contract particulars)

53. **Mr. van der Ziel** (Observer for the Netherlands), noting that the term "container" was used several times in draft article 42, said that the term should be expanded to include road and rail cargo vehicles as well, in order to make the language consistent with draft article 61, paragraph 2, which had been based on the so-called "container clause" of the Hague-Visby Rules. Under draft article 61, paragraph 2, each package in a container or road or railroad cargo vehicle counted as a unit for limitation purposes, provided the packages were enumerated in the contract particulars. That being the case, the carrier should be able to qualify the enumeration.

54. **Mr. Berlingieri** (Italy), noting that the term "closed container" was used in draft article 42, paragraphs 3 and 4, asked whether the adjective would also be applied to road or railroad cargo vehicles under the Netherlands' proposal.

55. **Mr. van der Ziel** (Observer for the Netherlands) said that "closed" should also apply to road and rail cargo vehicles because in the context of the article the term meant that the contents were not visible from outside the container.

56. **Mr. Miller** (United States of America) said that his delegation agreed with the proposal by the Netherlands.

57. **The Chairperson** said he took it that the Commission accepted the proposal to add a reference to a road or railroad cargo vehicle whenever a container was mentioned in draft article 42.

58. **Mr. Estrella-Faria** (International Trade Law Division) said that it would be possible to avoid repeating the words "road or railroad cargo" each time by adding a general definition of "vehicle" to draft article 1, which would indicate that "vehicle" meant "road or railroad cargo vehicle". The drafting group

could take up the matter when it met to harmonize all the language versions of the text.

59. **The Chairperson** said that the drafting group could consider that suggestion.

60. *Draft article 42, as amended, was approved in substance and referred to the drafting group.*

Draft article 43 (Evidentiary effect of the contract particulars)

61. **The Chairperson** recalled the statement by the representative of the Republic of Korea during the debate on draft article 38 that all the contract particulars in the transport document, and not just those listed in draft article 38, had evidentiary effect pursuant to draft article 43, subparagraphs (a) and (b).

62. **Mr. Elsayed** (Egypt) said that the wording of subparagraph (c) (ii) opened the door for substitution of goods and smuggling, and in fact similar cases had been heard before Egyptian and Jordanian courts. He proposed that the words "but not" before the phrase "the identifying numbers of the container seals" should be replaced by "and".

63. **Mr. Mollmann** (Observer for Denmark) said that the draft article was one of the instances where his delegation doubted whether it was appropriate to add the term "road and railroad cargo vehicles" because of the practical implications of the article, which was aimed at actual containers. Road vehicles often displayed an identification number, or at least a licence plate, but he did not know if that practice extended to railroad cargo vehicles. Regarding the suggestion of the representative of Egypt that the identifying numbers of the container seals should also be considered as conclusive evidence, the text was the result of extensive negotiation. The current wording was based on practical considerations, in that the carrier did not have full control over the seals; additional seals might be placed by customs authorities, for example. His delegation therefore favoured retaining the text as it stood.

The meeting rose at 1 p.m.

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Summary record of the 872nd meeting
Held at Headquarters, New York, on Thursday, 19 June 2008, at 3 p.m.

Chairperson: Mr. Illescas ..... (Spain)

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Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea (*continued*)

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08-39386 (E)

The meeting was called to order at 3.10 p.m.

Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea (*continued*) (A/CN.9/642, A/CN.9/645 and A/CN.9/658 and Add.1-13)

Draft article 43 (continued)

1. **The Chairperson** said that, in the absence of further comment, he took it that the majority of the Commission members were not in favour of the amendments proposed at the previous meeting.

2. *Draft article 43 was approved in substance and referred to the drafting group.*

Draft article 44 ("Freight prepaid")

3. *Draft article 44* was *approved in substance and referred to the drafting group.*

4. **The Chairperson** invited the Commission to turn to the definitions contained in draft article 1, paragraphs 14 to 16, 18 to 22 and 27.

Draft article 1, paragraph 14 (definition of "transport document")

5. **Mr. Sato** (Japan), drawing attention to his delegation's written comments (A/C.9/658/Add.6, para. 2), recalled that Working Group III (Transport Law), at its twenty-first session, had deleted all references to the consignor from the draft convention and had agreed that a mere receipt for the goods, which could be issued by a performing party, would not constitute a transport document for the purposes of the draft convention, since a transport document also had to evidence or contain a contract of carriage. His delegation did not think that a performing party could issue a transport document on its own initiative, rather than on behalf of the carrier, under the current definition. He therefore proposed that all references to "a performing party" should be deleted from the definition of "transport document".

6. **Mr. Elsayed** (Egypt) said that he agreed with the representative of Japan. His delegation would also like to add a new subparagraph (c) with wording along the lines of "Evidences the delivery of the goods to the consignee".

7. **Mr. Hu** Zhengliang (China) said that he supported the Japanese delegation's position. In addition, he proposed that the words "or a person acting on its behalf" should be added after the two references to "the carrier" in order to bring the paragraph into line with draft article 40 on signature.

8. **Mr. Sharma** (India) said that he, too, supported the proposal made by the representative of Japan.

9. **Mr. van der Ziel** (Observer for the Netherlands), supported by **Mr. Sandoval** (Chile), **Mr. Romero-Nasser** (Honduras), **Mr. Berlingieri** (Italy), **Mr. Mayer** (Switzerland) and **Mr. Miller** (United States of America), said that while he agreed with the representative of Japan, he could not support the amendment proposed by the representative of Egypt. In any case, draft article 11 clearly stipulated that the carrier must deliver the goods to the consignee. While he sympathized with the position of the Chinese delegation, he was hesitant to accept its proposal. Draft article 40 had been included because it was desirable to make it clear that a transport document could be signed by one person on behalf of another. Generally speaking, however, the concept of agency, an old transport practice that had caused many problems, had been deliberately left out of the draft convention.

10. **Mr.** Ibrahima Khalil **Diallo** (Senegal) said that he associated himself with the statement made by the representative of Japan. He was also sympathetic to the Chinese proposal since paragraph 14 might otherwise suggest that only the carrier could issue a transport document.

11. **The Chairperson** said he took it that the Commission wished to delete all references to "a performing party" from paragraph 14, but noted that there was insufficient support for the other proposals.

12. *Draft article 1, paragraph 14, as amended, was approved in substance and referred to the drafting group.*

Draft article 1, paragraph 15 (definition of "negotiable transport document") and paragraph 16 (definition of "non-negotiable transport document")

13. *Draft article 1, paragraphs 15 and 16 were approved in substance and referred to the drafting group.*

Draft article 1, paragraph 18 (definition of "electronic transport record")

14. **Mr. Sato** (Japan) proposed that all references to "a performing party" should be deleted from paragraph 18 for the reasons that he had given with reference to paragraph 14.

15. *Draft article 1, paragraph 18, as amended, was approved in substance and referred to the drafting group.*

Draft article 1, paragraph 19 (definition of "negotiable electronic transport record"), paragraph 20 (definition of "non-negotiable electronic transport record"), paragraph 21 (definition of the "issuance" of a negotiable electronic transport record), paragraph 21 (definition of the "transfer" of a negotiable electronic transport record) and paragraph 27 (definition of "freight")

16. *Draft article 1, paragraphs 19 to 22 and 27 were approved in substance and referred to the drafting group.*

Draft article 45 (Obligation to accept delivery)

17. **Mr. Blake-Lawson** (United Kingdom), drawing attention to his delegation's written comments (A/C.9/658/Add.13, paras. 15-19), said that he had deep misgivings about the entire chapter on delivery of the goods, which, if adopted, would prejudice the United Kingdom's adoption of the draft convention. The chapter would create more problems than it solved and could facilitate fraud. The current text was the result of long negotiation, but he thought that it was important to reconsider it.

18. Draft article 45 raised a number of questions; it was not clear what the consignee must do in order to incur the obligation to accept delivery, whether a consignee that did not initially exercise its rights under the contract of carriage but later accepted delivery of the goods would be retroactively in breach of the draft article, and whether the carrier had any remedy in the event of a breach of the obligation.

19. **Ms. Czerwenka** (Germany), drawing attention to her delegation's written comments (A/C.9/658/Add.11, para. 18), said that she shared the concerns raised by the representative of the United Kingdom; the draft article created an obligation for the consignee without specifying the point at which that obligation arose. It would be preferable to replace "the consignee that exercises its rights" with "the consignee that requires delivery of the goods".

20. **Mr. Kim** Bong-hyun (Republic of Korea) said that he agreed with the representatives of the United Kingdom and Germany. His delegation would welcome examples of ways in which the consignee could exercise its rights under the contract of carriage, perhaps by making a claim against the carrier or by exercising its right of inspection. He hoped that other delegations could provide additional information on that point.

21. **Ms. Downing** (Australia) said that she associated herself with the previous speakers, particularly the United Kingdom.

22. **Mr. Mayer** (Switzerland) said that he, too, shared the concerns expressed by the representative of the United Kingdom. His delegation had stated in the past that it did not think the consignee's exercise of its rights under the contract of carriage was an appropriate criterion for determining the point as from which the consignee should be bound by that contract. Rather than the language suggested by the representative of Germany, he would prefer to introduce a reference to the consignee's explicit or implicit consent to be the consignee.

23. **Mr. Sato** (Japan) said that his delegation had raised the issue repeatedly in the Working Group, but its proposal to replace "the consignee that exercises its rights under the contract of carriage" by "the consignee that demands delivery" had always been rejected. However, he was prepared to accept the wording suggested by the German delegation.

24. **Mr. van der Ziel** (Observer for the Netherlands) said that he could not support the proposed change. Draft article 45 was intended to address a specific problem for the carrier: that of the consignee who was well aware that the goods were being shipped and who did not wish to accept delivery for a variety of reasons. That was a fairly common business attitude and should be legislated against. An example of the consignee exercising its rights might include, for example, inspecting the goods before demanding delivery. If the consignee then decided to reject the goods, it should not be allowed to leave the problem in the carrier's hands. According to the United Nations Convention on Contracts for the International Sale of Goods, even a buyer wishing to reject goods must accept delivery, but

could do so on behalf of the seller. The draft convention should provide that the consignee must either accept the goods as the agent of the seller or instruct the carrier what to do with them. The consignee, not the carrier, should bear the risk and take the responsibility of lodging a claim or sending the goods back. Of course, inspection was not the only action covered by the phrase "exercises its rights"; it could mean that the consignee had been actively engaged with the carrier. The point was that the consignee must allow the carrier to be discharged, and the solutions proposed by Germany and Japan did not accomplish that.

25. **Mr. Tsantzalos** (Greece), supported by **Ms. Carlson** (United States of America), **Mr. Hu** Zhengliang (China), **Mr. Sandoval** (Chile), **Ms. Slettemoen** (Norway) and **Mr. Mollmann** (Observer for Denmark), said that the arguments of the representative of the Netherlands were convincing that such a provision was needed. The current text of draft article 45 had been arrived at by compromise and should be retained.

26. **Mr. Imorou** (Benin), supported by **Mr. Moulopo** (Observer for the Congo) said that his delegation did not find the arguments of the Netherlands convincing, since draft article 45 involved a contract of carriage, not a sales contract; it therefore supported the proposal of Germany.

27. **Ms. Shall-Homa** (Nigeria) said that, in the light of the extensive provisions on the obligations of the shipper to the carrier in chapter 7 and in the spirit of a fair division of risks and responsibilities between the carrier and the consignee, her delegation supported the proposal of Germany.

28. **Mr. Berlingieri** (Italy), **Ms. Halde** (Canada), **Mr.** Ibrahima Khalil **Diallo** (Senegal), **Ms. Wakarima Karigithu** (Kenya), **Ms. Talbot** (Observer for New Zealand), **Mr. Bigot** (Observer for Côte d'Ivoire), **Ms. Traore** (Observer for Burkina Faso) and **Mr. Luvambano** (Observer for Angola), also supported the proposal of Germany.

29. **The Chairperson** noted that there seemed to be sufficient support for the proposal to replace the words "exercises its rights" with the words "requires delivery of the goods".

30. **Ms. Carlson** (United States of America) said that the verb "demands", as proposed by Japan, would perhaps be more correct than "requires", while conveying the same idea.

31. **Ms. Czerwenka** (Germany) said that her delegation had no problem with the substitution of "demands" for "requires".

32. *Draft article 45, as amended, was approved in substance and referred to the drafting group.*

Draft article 46 (Obligation to acknowledge receipt)

33. *Draft article 46 was approved in substance and referred to the drafting group.*

Draft article 47 (Delivery when no negotiable transport document on negotiable electronic transport record is issued)

34. **Mr. Blake-Lawson** (United Kingdom), supported by **Mr. Delebecque** (France), said that his delegation was concerned that the protection provided to the carrier depended on the carrier's having followed the prescribed procedures, which might not always be available. In subparagraph (c), the carrier, if unable to locate the controlling party, was told to advise the shipper, which should then give instructions in respect of the delivery of the goods. However, in cases where the shipper had transferred all its rights to a controlling party, it could not give delivery instructions without the express authorization of the controlling party.

35. **The Chairperson** said that, in the absence of further comments, he took it that the majority of the Commission did not share those concerns.

36. *Draft article 47 was approved in substance and referred to the drafting group.*

Draft article 48 (Delivery when a non-negotiable transport document that requires surrender is issued)

37. *Draft article 48 was approved in substance and referred to the drafting group.*

Draft article 49 (Delivery when a negotiable transport document or negotiable electronic transport record is issued)

38. **Ms. Downing** (Australia), drawing attention to her delegation's written comments (A/CN.9/658, paras. 48-52), noted that the draft article was intended to address a practical problem frequently faced by carriers when the cargo owner appeared without the

requisite documents or did not appear at all. However, the solution proposed had very serious flaws. The draft article as written would undermine confidence in the system of the bill of lading as a document of title and increase the risk of fraud without effectively solving the carrier's problem. The alternative procedures in subparagraph (d) for obtaining instructions for the delivery of the goods without a bill of lading would eliminate the long-standing requirement to deliver on the production of a bill of lading and would affect banks and other parties relying on that security. Yet the procedures proposed would not solve the problem, because a prudent shipper would not issue delivery instructions without authorization from the rightful owner, since a shipper that did so might be subject to lawsuit. The Australian banking sector had commented that the provision would impose additional risks on banks.

39. The statutory indemnity provided for in subparagraph (f) was also problematic. A seller providing the carrier with alternative delivery instructions would unwittingly be giving the carrier an indemnity that would make it more difficult for a CIF cargo insurer to institute a recovery action or for a cargo claimant to recover for misdelivery. Moreover, since the effect of subparagraphs (d) to (f) was that a carrier who sought alternative delivery instructions from a shipper would be relieved of liability to the holder of a bill of lading, the shipper would be giving an indemnity to a party that had no liability.

40. There were other practical solutions available to the carrier. One possibility was that carriers concerned about certain destinations could insist on prepaid freight including all destination charges, the latter to be refunded if the goods were collected. Australia had procedures that could be followed for turning abandoned goods over to police or customs.

41. **Mr. Delebecque** (France) agreed that the provisions obliging a shipper that was no longer in a position to do so to give delivery instructions and to indemnify the carrier were problematic and would seriously affect confidence in the bill of lading as security. His delegation would prefer to delete subparagraphs (d) to (h).

42. **Mr. van der Ziel** (Observer for the Netherlands) said that the trade as a whole, bankers as well as carriers, had engaged in practices that had undermined the function of the bill of lading. Whenever experts had studied the problem it had been concluded that practitioners could not solve it without the assistance of legislators. The Commission should therefore seize the opportunity to restore trade law in that area. If the system established by draft article 49 created other problems in practice, then practical solutions would have to be found for them.

43. He took strong exception to some assertions that had been made — first of all, that the new system would lead to fraud. Frankly, it was the current system that encouraged fraud: often, for instance, there were three originals of the negotiable transport document in circulation, making it easy to sell them to multiple buyers. It was simple to forge a bill of lading with the current copying techniques. The guarantee system involving delivery against letters of indemnity meant that bills of lading continued to circulate after delivery. The new system, on the contrary, eliminated existing types of fraud. If and when it was shown to facilitate new types of fraud, they could deal with it.

44. Secondly, it was asserted that the banking sector would be assuming additional risk. Yet the new system tended to remove the existing risk, and restored the very essence of the bill of lading system, namely, that the transport document itself, and not a letter of indemnity, legitimated the person entitled to delivery at the place of destination. Draft article 49 put the onus on the holder of the document, which could well be a bank to give the carrier delivery instructions when the goods arrived at destination. That meant, of course, that the bank might have to take action if it did not want its collateral to become worthless — but that could by no means be described as a risk. Additionally, the new system provided legal security in respect of bills of lading, which were currently allowed to continue in circulation after delivery, raising all kinds of legal questions about their validity, generally by voiding those still in circulation.

45. Thirdly, it had been asserted that the lines of authority were unclear. Under draft article 49, the holder of the bill obviously needed no special authorization; when the holder was in default, the carrier, who was generally in a good position to do so, was under the obligation to search for the holder, and if the carrier could not find the holder, it must ask for instructions from the shipper, who admittedly might have to seek authorization from an absent holder. However, that was a cargo-side problem for which

there were solutions, and he would be glad to see draft article 49 improved on that point.

46. He urgently appealed to the Commission, in view of the very serious structural problem in the trade, to recognize that article 49, drafted after extensive discussions and broad consultation with industry practitioners, including banks and commodity traders, solved a number of problems. The time had come for the industry to change its practices.

47. **Mr. Elsayed** (Egypt), agreeing with Australia, Germany and others that article 49 was ambiguous, favoured the holding of informal consultations with a view to redrafting the article from a legal rather than a technical standpoint. A more legal approach should have been taken in the first place.

48. **Mr. Blake-Lawson** (United Kingdom) acknowledged that the current system did encourage fraud, but familiar risks were more easily controlled. The disadvantage of the new system proposed in draft article 49 was that it complicated the current legal position and would stand in the way of a satisfactory and comprehensive reform of the law. The Commission had a chance now to develop a better system, but it could not do so in just a few more days. He therefore reverted to his original proposal to delete draft article 49 and devote more time in the future to finding the best solution for that particular problem.

49. **Mr. Berlingieri** (Italy) said that a number of national legal systems had a procedure for extinguishing a document of title, but unfortunately it took a long time, often months. Draft article 49 offered a rapid procedure, albeit one that perhaps did not offer sufficient security to all interested parties. An effort should be made in informal consultations to enhance the security aspect.

The meeting was suspended at 4.45 p.m. and resumed at 5.15 p.m.

50. **Ms. Slettemoen** (Norway) said that draft article 49, subparagraph (d), did not offer a practical solution. It was couched in terms not of the rights and obligations of the carrier but rather of instructions to be given, and it created problems in respect of the bill of lading. The banking community in Norway found the provision worrisome. She proposed deleting subparagraph (d), and, for the same reasons, deleting the similar provision in article 48, subparagraph (b).

51. **Ms. Talbot** (Observer for New Zealand) said that her delegation supported the comments of Australia, whose banking system closely resembled that of New Zealand. Draft article 49, in attempting to solve a very real problem for carriers, seemed likely to create other problems for the banking industry.

52. **Mr. Miller** (United States of America) said that article 49 did not offer a perfect solution to an acknowledged problem, but it was the best that the Working Group had been able to devise in six years. He doubted that the Commission would be able to improve on it in the current session, but his delegation was willing to participate in informal consultations in an attempt to do so. It believed that the Commission should seize the opportunity to make some changes, for that was better than no solution at all.

53. **Mr. Tsantzalos** (Greece), supporting the Netherlands, said that his delegation favoured retention of the current text.

54. **Mr. Morán Bovio** (Spain) said that the current text of draft article 49 should be retained. It solved a good number of problems and had met with approval in both the banking and the maritime circles in his own country.

55. **Ms. Czerwenka** (Germany) said that she found the Australian and United Kingdom statements very persuasive. It was not likely that the Commission could resolve such an extremely complex matter to everyone's satisfaction, and it was not clear that draft article 49 actually improved the situation at all. A policy decision was required, not merely informal consultations. Her delegation supported France's proposal to delete paragraphs (d) to (h).

56. **Mr. Mollmann** (Observer for Denmark) said that there was a practical problem to be resolved, not just for carriers but for all involved in the trade, especially for consignees without a bill of lading to present. Draft article 49 was perhaps not the perfect solution, but it had been thought through and had by and large received a favourable response from the industry. He endorsed the remarks of the Netherlands. The draft article would resolve many problems for all parties in practice, and it would be a mistake not to seize the opportunity to improve the situation. His delegation strongly recommended the approval of draft article 49 as it stood.

57. **Mr. Kim** In Hyeon (Republic of Korea) and **Mr. Sandoval** (Chile) agreed that draft article 49 should be retained in its current wording.

58. **Mr. Delebecque** (France) said that the scenario described in subparagraph (d) was fairly common and therefore required a solution. On reflection, the solution proposed — that, in the event the holder did not claim delivery of the goods, the carrier should seek instructions from the controlling party, the shipper or the documentary shipper — seemed acceptable.

59. With regard to subparagraphs (e) to (h), however, his delegation had a fundamental problem with the idea that, in the event that the holder did not claim delivery of the goods, responsibility would be placed on the shipper. The shipper was not the guarantor of the consignee. Furthermore, the consignee and the shipper were two completely different parties, and the responsibilities of the former could not be transferred to the latter. While his delegation supported some of the ideas expressed in the subparagraphs in question, overall they went too far, for they overturned existing practices and called into question the very way in which the contract of carriage and the relationship between sale and transport were preserved. Subparagraphs (e) to (h) at least should therefore be deleted.

60. **Mr. Hu** Zhengliang (China) reiterated his delegation's position that the arrangements set out in draft article 49 would solve some problems but create others. In particular, the arrangement contained in subparagraph (d) would be time-consuming and costly for the carrier. If, as his delegation preferred, subparagraphs (d) to (h) were deleted, any goods whose delivery was not claimed would simply be deemed to be goods remaining undelivered and draft article 50 would come into play. That said, his delegation might consider retaining the provisions in question if the wording could be improved; however, that might not be feasible so late in the day.

61. **Ms. Czerwenka** (Germany) said that her delegation agreed that subparagraph (d) was also problematic. However, her delegation's concerns related to the statement that if, after reasonable effort, the carrier was unable to locate the controlling party, the carrier should so advise the shipper; the shipper was not the holder of the document. Her delegation therefore favoured the deletion of subparagraphs (d) to (h).

62. **Ms. Halde** (Canada) said that her delegation supported the deletion of subparagraphs (d) to (h). That said, she welcomed the idea of holding informal consultations to try to improve the wording of the draft article.

63. **Mr. Sharma** (India) said that the subparagraphs in question, though somewhat complicated, addressed a very practical problem, namely, what to do in the event that the holder did not claim delivery of the goods. If the goods were simply deemed to be goods remaining undelivered, article 50 would be invoked. It was not unreasonable, in his view, for the carrier to be required to take certain steps before that happened. His delegation therefore supported the retention of subparagraphs (d) to (h).

64. **The Chairperson** said that the Commission seemed to be divided almost equally between delegations in favour of deleting all or part of the draft article and delegations in favour of retaining the draft article. Since some of the latter delegations had acknowledged that the wording could be better, he suggested that an effort should be made to improve the text in informal consultations. If a favourable outcome was not achieved, however, the current version of the draft article should be retained, in line with the usual practice in such cases.

65. **Ms. Czerwenka** (Germany) said that the Chairperson's statement that, in the absence of a favourable outcome, the current version of the draft article should be retained was somewhat at odds with the approach he had taken thus far. In her view, every effort should always be made to find a good compromise that was acceptable to all delegations; to say that the current wording would be retained if no favourable outcome was found was not a compromise. If informal consultations failed, the Commission should be able to consider the text again so as to make a clear decision as to whether or not the current wording should be retained.

66. **The Chairperson** said that the draft convention before the Commission was the result of six years of discussions in the Working Group. As he had announced at the start of the session, the text would be modified only when that was the clear will of the majority of the Commission. Just the day before, the Commission had clearly disagreed with the Working Group in respect of draft article 36 and the draft article had been deleted. The only time when he had not

applied that rule was in respect of draft article 12, where, despite a slight majority in favour of retention, he had facilitated informal consultations.

67. In the case of draft article 49, the delegations in favour of deleting all or part of the draft article were still outnumbered by the delegations in favour of retaining the draft article as it currently stood. However, since some of the delegations in favour of retention had indicated their willingness to try to improve the wording, he took it that the Commission wished to hold informal consultations on draft article 49.

68. *It was so decided.*

69. **Mr. Elsayed** (Egypt) said that his delegation agreed with the Chairperson's suggestion and, as representative of the States belonging to the Council of Arab Ministers of Transport, wished to participate in efforts to improve the wording of draft article 49.

The meeting rose at 6.05 p.m.

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General Assembly

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United Nations Commission on International Trade Law

Forty-first session

Summary record of the 873rd meeting
Held at Headquarters, New York, on Friday, 20 June 2008, at 10 a.m.

Chairman: Mr. Illescas ..... (Spain)

Contents

Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea (*continued*)

* No summary record was prepared for the rest of the meeting.

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08-39368 (E)

The meeting was called to order at 10.10 a.m.

Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea (*continued*) (A/CN.9/642, A/CN.9/645 and A/CN.9/658 and Add.1 to 13)

1. **The Chairperson**, in response to queries at the previous meeting regarding the Commission's working methods, drew attention to paragraph 11 of document A/CN.9/653, "UNCITRAL rules of procedure and methods of work", elaborating on the concept of consensus in the work of the Commission. Paragraph 11 (c), described the Chairperson's role in determining the existence of consensus and allowed for a vote to be taken if a delegation formally disagreed with that assessment. Although that rarely happened in current practice, members did have the right to object.

Draft article 50 (Goods remaining undelivered)

2. **Mr. Mollmann** (Observer for Denmark) said that draft articles 49 and 50 were closely related. Draft article 49 aimed at making it possible to deliver goods without a transport document, while draft article 50 gave instructions to a carrier on the disposition of goods if they could not be delivered. He saw the articles as alternative possibilities that did not have to be applied in sequence. A carrier could follow the procedures outlined in draft article 50 before using the procedures in draft article 49, or could use them simultaneously.

3. **Mr. Rapatzikos** (Greece), drawing attention to his delegation's written comments (A/CN.9/658/Add.10, para. 13), said that his delegation shared the Danish interpretation of draft article 50 but thought that the text required further clarification.

4. **Mr. Imorou** (Benin), supported by **Mr. Elsayed** (Egypt), **Mr. Egbadon** (Nigeria), **Mr. Ngoy Kasongo** (Observer for the Democratic Republic of the Congo), **Ms. Traoré** (Observer for Burkina Faso), **Mr. Moulopo** (Observer for the Congo), **Mr. Bigot** (Observer for Côte d'Ivoire) and **Mr. Luvambano** (Observer for Angola) said that in many States under national law a carrier could not destroy undelivered goods but must turn them over to the customs authorities. Destruction of goods was a serious step. Therefore paragraph 2 (b) should contain the same phrase, "pursuant to the law or regulations of the place where the goods are located at the time", that appeared in paragraph 2 (c) regarding the sale of undelivered goods.

5. **Ms. Slettemoen** (Norway) said that her delegation agreed that the carrier should be able to apply the provisions of draft article 50 without being required to apply draft article 49, but that interpretation was not clear from the text as it stood. That understanding should be reflected in the Commission's report and should be made clear in the text as well.

6. **Mr. Mayer** (Switzerland) said that he had no firm view on the position of the observer for Denmark but did not see how it could be reconciled with the text of draft article 50. The use of "only if" in the chapeau of paragraph 1 implied that the list of events covered in subparagraphs (a) to (e) was exhaustive, and subparagraph (b) implied that the carrier would first have to follow the procedures in draft article 47, 48 or 49. With regard to paragraph 2 (b), his delegation favoured retaining the current text.

7. **Mr.** Ibrahima Khalil **Diallo** (Senegal) said that, as the destruction of cargo was a serious matter, his delegation supported the amendment proposed by Benin. In other respects, the text of draft article 50 was sufficiently explicit.

8. **Mr. Sharma** (India) said that he shared the understanding of the representative of Switzerland as to the reading of draft article 50. The procedure in draft article 50 for dealing with goods deemed undelivered could only be commenced after the procedure in draft article 49 had been exhausted.

9. **Mr. Mollmann** (Observer for Denmark) said that the proposal of the representative of Benin was useful; his delegation shared the understanding that any destruction of cargo under paragraph 2 (b) must be in accordance with local laws and regulations. In response to the representative of Switzerland, he pointed out that draft article 50, paragraph 1, described five different situations in which goods could be deemed undeliverable, with the fifth situation being simply that the goods were otherwise undeliverable by the carrier. That the five situations were alternative rather than cumulative was clearly shown by the "or" at the end of paragraph 1 (d). Having that reading of the article reflected in the report, however, would avoid any possible misunderstandings.

10. **Mr. van der Ziel** (Observer for the Netherlands) said that at times destruction of the goods might be the

only alternative, for example, where the goods were seriously damaged or perishable, but it should be a last resort. The proposal of Benin would be a useful addition to the text. He agreed with the Danish interpretation regarding the relationship between draft articles 49 and 50; there was no need to change the text in that regard, and the request to include a clarification of those provisions in the report of the Commission should be honoured.

11. Pending the outcome of informal consultations on draft article 49, as a consequential change the term "holder" might need to be added to draft article 50, paragraph 1 (b).

12. **Mr. Alba Fernández** (Spain) said that he endorsed the Danish interpretation regarding the relationship between draft articles 49 and 50, and indeed draft articles 47 and 48 as well. The carrier, to safeguard its position, should be able to commence the procedures permitted under draft article 50 without first having to resort to the procedures under draft articles 47, 48 or 49. The current wording of draft article 50 was sufficiently clear, but confusion could perhaps be avoided by deleting paragraph 1 (b), which was not strictly necessary, since the situation was covered by paragraph 1 (a).

13. **Mr. Sato** (Japan) said that the proposal by the representative of Benin should be carefully drafted to clarify the procedure. If there was a law or regulation concerning destruction in the place where the goods were located, the carrier should, of course, follow it; however, if the amendment could be taken to mean that the carrier always needed permission from an authority, it would place an undue restriction on its action. There might be an urgent need to destroy goods for safety reasons and no established procedure to follow.

14. **Mr. Shautsou** (Belarus) proposed that the phrase "pursuant to the law or regulations of the place where the goods are located at the time" should be placed in the chapeau of paragraph 2 so that it would apply to all the subparagraphs. Further, he proposed adding the phrase "for reasons that do not depend on the carrier" at the end of paragraph 1 (e) in view of the serious consequences when goods were deemed undeliverable.

15. **Mr. Miller** (United States of America) said that his delegation generally supported the retention of draft article 50 in its current wording. The conditions listed in paragraphs 1 (a) to (e) were alternative, not cumulative. If drafted properly, the solution suggested by the representative of Benin might be helpful. If there were applicable rules in the port where the goods were located, the carrier should comply with them. He shared the concerns expressed by the delegation of Japan regarding undue restrictions of the right to destroy the goods in cases where the carrier was left with undeliverable goods and no guidance.

16. **Mr. Berlingieri** (Italy) said that his delegation also supported the proposal made by the representative of Benin and suggested that mention of destruction of the goods should be moved to subparagraph 2 (c). Whether the same precautions for sale of the goods should also apply to destruction of the goods was a matter of drafting.

17. **Ms. Wakarima Karigithu** (Kenya) said that her delegation endorsed the proposal made by the representative of Benin. The language of paragraph 2 (c), if applied to the destruction of goods in paragraph 2 (b), should address the problem adequately.

18. **Mr. Delebecque** (France) agreed that destruction of goods was a serious act and should be carried out pursuant to local laws. He endorsed the suggestion made by the representative of Italy to mention destruction of goods in paragraph 2 (c), or perhaps in a new paragraph 2 (d).

19. **Mr. Mayer** (Switzerland), citing article 49, subparagraph (f), which stated that the carrier might refuse to follow instructions if the person failed to provide adequate security, pointed out that the implication was that the carrier was required to follow instructions under all other circumstances. It followed that the carrier would be obliged to attempt to obtain instructions from the controlling party or the shipper before initiating the procedure described in article 50. Therefore, the reading of those two articles by the observer for Denmark was irreconcilable with the text as currently drafted.

20. **Mr. Ndzibe** (Gabon) pointed out that a ship arriving at a port of destination was required to report to customs and that, in so doing, it automatically became subject to the local laws and regulations. His delegation could support the proposal by the representative of Benin provided that paragraphs 2 (b) and (c) reflected that situation.

21. **Ms. Slettemoen** (Norway) proposed the addition of the phrase "without regard to the provisions of

articles 47, 48 and 49 but" after the word "article" in the first line of paragraph 3, in order to clarify the point made by the observer for Denmark.

22. **Mr. Elsayed** (Egypt) said that the actions in respect of the goods listed in paragraph 2 (b) should be subject to the condition mentioned in paragraph 2 (c), namely, that such actions must be carried out in accordance with the practices or pursuant to the law or regulations of the place where the goods were located. The entire paragraph should be redrafted to reflect that change. In that sense his delegation endorsed the proposal made by the representative of Benin.

23. **The Chairperson** took it that the Commission accepted the amendment proposed by the delegation of Benin, borrowing the language in paragraph 2 (c) for the provision on the destruction of goods. The Commission's report would reflect the discussion on the interpretation of draft article 50, paragraphs 1 (a) to (c) in relation to draft articles 47, 48 and 49.

24. *Draft article 50, as amended, was approved in substance and referred to the drafting group.*.

Article 51 (Retention of goods)

25. *Draft article 51 was approved in substance and referred to the drafting group.*

Draft article 1, paragraph 9 (definition of "documentary shipper")

26. *Draft article 1, paragraph 9, was approved in substance and referred to the drafting group.*

Draft article 52 (Exercise and extent of right of control)

27. **Mr. Imorou** (Benin) said that several aspects of article 52 were unclear. He wondered how the controlling party might modify instructions in respect of the goods, replace the consignee or obtain delivery of the goods at a port of call without changing the contract of carriage.

28. **Mr. Elsayed** (Egypt) said that the chapeau of paragraph 1 should be amended to state that the right of control might be exercised by the controlling party so long as it did not change the contract of carriage.

29. **Ms. Czerwenka** (Germany) said that her delegation supported the retention of article 52 as drafted. In certain situations, it was important for the controlling party to give instructions, despite the potential change to the contract of carriage. Furthermore, although replacing the consignee might create problems, relevant precautions were covered by other provisions of chapter 10 on rights of the controlling party.

30. **Mr. Miller** (United States of America), **Mr. Kim** In Hyeon (Republic of Korea) and **Mr. Shautsou** (Belarus), endorsed the statement by the representative of Germany.

31. **Mr. Ngoy Kasongo** (Observer for the Democratic Republic of the Congo) said that he understood the concerns expressed by the representatives of Benin and Germany. He called for prudence in determining the specific conditions under which the controlling party might replace the consignee and noted that explicit mention of them would add to the clarity of the article.

32. **Mr. Sato** (Japan) said that his delegation supported the retention of the current text and noted that, in certain situations, it was indeed possible to modify instructions without changing the contract of carriage. Inclusion of specific conditions in the current article might create confusion, since other provisions of the same chapter addressed those conditions.

33. **The Chairperson** took it that a majority of the Commission members favoured retention of the current text of draft article 52.

34. *Draft article 52 was approved in substance and referred to the drafting group.*

Draft article 53 (Identity of the controlling party and transfer of the right of control)

35. **Mr. van der Ziel** (Observer for the Netherlands) said that his delegation had proposed a consequential change to draft article 53 in its written comments (A/CN.9/658/Add.9, para. 23). The chapeau of paragraph 1 should begin with the words "Except in the cases referred to in paragraphs 2, 3 and 4".

36. **Mr. Sato** (Japan), **Mr. Berlingieri** (Italy) and **Mr. Sharma** (India) endorsed the correction made by the observer for the Netherlands.

37. **Mr. Hu** Zhengliang (China), supported by **Mr. Miller** (United States of America), pointed out that the reference in paragraph 3 (c) should be to "article 1, subparagraph 10 (a) (i)".

38. **The Chairperson** took it that the Commission approved the technical corrections suggested.

39. *Draft article 53, as amended, was approved in substance and referred to the drafting group.*

Draft article 54 (Carrier's execution of instructions), draft article 55 (Deemed delivery), Draft article 56 (Variations to the contract of carriage), Draft article 57 (Providing additional information instructions or documents to carrier)

40. *Draft articles 54 to 57 were approved in substance and referred to the drafting group.*

Draft article 58. Variation by agreement

41. **Mr. Sato** (Japan) asked whether, since a paragraph 2 had recently been added to draft article 53, the reference to article 53, paragraph 1 (b), in draft article 58 should be expanded to take that into account.

The meeting was suspended at 11.40 a.m. and resumed at 12.15 p.m.

42. **Mr. van der Ziel** (Observer for the Netherlands) said that after consultations it had been concluded that there was no need to change the reference to draft article 53 in draft article 58.

43. *Draft article 58 was approved in substance and referred to the drafting group.*

Draft article 1, paragraph 12 (definition of "right of control") and paragraph 13 (definition of "controlling party")

44. *Draft article 1, paragraphs 12 and 13, were approved in substance and referred to the drafting group.*

45. **The Chairperson** invited representatives of the informal groups set up to review draft article 12, draft article 13 and draft article 38 to report on the outcome of their consultations.

Draft article 12 (Period of responsibility of the carrier) (continued)

46. **Mr. Sato** (Japan) reported that, despite lengthy consultations, no consensus had been achieved on a possible improvement to paragraph 3 of draft article 12. He assumed, therefore, that the text would remain unchanged.

47. **Mr. Alba Fernández** (Spain) said that, in its current wording, the draft article impaired the internal consistency of the draft convention. Problems could result from a possible discrepancy between the provisions of paragraphs 1 and 3. Situations could arise in which the right of control, which coincided with the carrier's period of responsibility, commenced subsequent to the issuance of the transport document. While noting that his delegation's proposal to include in paragraph 3 the phrase "subject to the provisions of paragraph 1" had not been accepted, he again proposed that the phrase "For the purposes of determining the carrier's period of responsibility" should be deleted from the chapeau of paragraph 3.

48. **Ms. Czerwenka** (Germany) agreed that paragraph 3 presented a problem of interpretation which would be averted by the proposed deletion. The suggested addition of a reference to paragraph 1 would also be useful and had found some support in informal consultations.

49. **Ms. Carlson** (United States of America) and **Mr. Sharma** (India) said that, since no consensus had been reached on the draft article in informal consultations, the existing text should be retained.

50. **Mr. Lebedev** (Russian Federation) wished to know whether the proposed deletion in paragraph 3 had been discussed in informal consultations.

51. **Mr. Sato** (Japan) said that the deletion had been discussed but the concern raised by the representative of Spain in respect of the commencement of the right of control, especially in cases where the transport document had been issued earlier, had not been discussed in informal consultations.

52. *Draft article 12 was approved in substance and referred to the drafting group.*

Draft article 13 (Transport beyond the scope of the contract of carriage) (continued)

53. **Mr. Berlingieri** (Italy), reporting on informal consultations, said that he had hoped that a clearer wording would be found for draft article 13 and that the need to delete it would thereby be averted. However, despite all the efforts made to specify the subject matter and effects of the single transport document contemplated in the article, that had not proved possible. There seemed therefore to be no choice but to delete draft article 13.

54. **Mr. Sato** (Japan), while concurring in the deletion, said that it had been agreed that deletion

should not be taken to imply any criticism of the current practice in the trade of issuing a single transport document.

55. *Draft article 13 was deleted.*

Draft article 38 (Contract particulars) (continued)

56. **Mr. Sato** (Japan) reported that every effort had been made in informal consultations to incorporate into the list of contract particulars contained in paragraph 1 the largest possible number of the additional items proposed, together with any necessary qualification so as to avoid potential problems in practice. It had not been deemed wise to include the sensitive issue of approximate date of delivery, because of its close relation to the carrier's liability for delay, covered by draft articles 22, 23 and 24. He proposed the following new paragraph 2, *bis*:

> "2 *bis*. The contract particulars in the transport document or the electronic transport record referred to in article 37 shall furthermore include:
>
> "(a) The name and address of the consignee if named by the shipper;
>
> "(b) The name of a ship if specified in the contract of carriage;
>
> "(c) The place of receipt and, if known to the carrier, the place of delivery;
>
> "(d) The port of loading and the port of discharge if specified in the contract of carriage."

57. **Mr.** Ibrahima Khalil **Diallo** (Senegal), **Mr. Elsayed** (Egypt), **Mr. Imorou** (Benin), **Ms. Wakarima Karigithu** (Kenya), **Mr. Sharma** (India) **Mr. Ngoy Kasongo** (Observer for the Democratic Republic of the Congo) and **Mr. Moulopo** (Observer for the Congo), expressed support for the proposal.

58. *Draft article 38, as amended, was approved in substance and referred to the drafting group.*

The meeting rose at 1 p.m.

United Nations A/CN.9/SR.874

General Assembly

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United Nations Commission on International Trade Law

Forty-first session

Summary record of the 874th meeting
Held at Headquarters, New York, on Friday, 20 June 2008, at 3 p.m.

Chairperson: Mr. Illescas ..... (Spain)

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08-39374 (E)

The meeting was called to order at 3.20 p.m.

Election of officers (*continued*)

1. **Mr. Bigot** (Observer for Côte d'Ivoire), speaking on behalf of the African States, nominated Mr. Amadou Kane Diallo (Senegal) for the office of Vice-Chairperson.

2. **Mr. Mbiah** (Observer for Ghana), **Mr. Elsayed** (Egypt), on behalf of the Arab States, **Ms. Wakarima Karigithu** (Kenya), **Mr. Egbadon** (Nigeria), **Ms. Downing** (Australia), **Mr. Moulopo** (Observer for the Congo), **Mr. Miller** (United States of America), **Mr. Berlingieri** (Italy), **Mr. Lebedev** (Russian Federation), **Mr. Delebecque** (France), **Mr. Blake-Lawson** (United Kingdom), **Ms. Talbot** (Observer for New Zealand), **Mr. Sato** (Japan), **Mr. van der Ziel** (Observer for the Netherlands), **Mr. Ousseimi** (Observer for the Niger), **Mr. Kim** In Hyeon (Republic of Korea), **Ms. Czerwenka** (Germany), **Mr. Hu** Zhengliang (China), **Mr. Mollmann** (Observer for Denmark), **Mr. Imorou** (Benin), **Mr. Sharma** (India), **Mr. Luvambano** (Observer for Angola), **Mr. Schelin** (Observer for Sweden), **Mr. Ngoy Kasongo** (Observer for the Democratic Republic of the Congo), **Mr. Tsantzalos** (Greece), **Ms. Mbeng** (Cameroon), **Ms. Halde** (Canada), **Mr. Nzibe** (Gabon), **Ms. Slettemoen** (Norway) and **Ms. Traoré** (Observer for Burkina Faso) endorsed the nomination.

3. *Mr. Amadou Kane Diallo (Senegal) was elected Vice-Chairperson by acclamation.*

Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea (*continued*) (A/CN.9/642, A/CN.9/645 and A/CN.9/658 and Add.1-13)

Draft article 59 (When a negotiable transport document or negotiable electronic transport record is issued)

4. **Mr. Blake-Lawson** (United Kingdom) said that his delegation had considerable concerns about chapter 11 on transfer of rights. The current draft text lacked sufficient detail to achieve either certainty or the harmonization of national law. In addition, it should not be subject to the same conditions of applicability as the remainder of the draft convention. The chapter needed to be further clarified and modified to be of benefit to future shippers, consignees and carriers. The whole chapter should therefore be removed and worked on further.

5. As an example, draft article 59 did not address when and under which circumstances a negotiable transport document might become exhausted as a document of title or when and under which circumstances the right to possession of the goods might therefore cease to attach to the document. Nor did it address the effect of transferring the document once that stage had been reached. It was also unsatisfactory that transfer rights under straight bills of lading were not covered. It would make more sense to provide that the rights to delivery of the goods were transferred by transfer of the document from the shipper to the consignee, rather than to leave the matter to national law. His delegation also had concerns in respect of draft article 60 but would reserve its comments until the discussions on draft article 59 had been completed.

6. **Ms. Downing** (Australia), drawing attention to her delegation's written comments (A/CN.9/658, para. 55) and expressing support for the concerns raised by the representative of the United Kingdom, said that her delegation's concerns in respect of draft articles 59 and 60 stemmed from the fact that they were narrower in scope than current national law and couched in vague language.

7. **The Chairperson** said that, in the absence of any other comments, he took it that the Commission wished to approve draft article 59.

8. *Draft article 59 was approved in substance and referred to the drafting group.*

Draft article 60 (Liability of holder)

9. **Mr. Kim** In Hyeon (Republic of Korea) wondered whether it might be appropriate to replace the phrase "exercise(s) any right" in paragraphs 1, 2 and 3 by the phrase "demand(s) delivery of the goods", by analogy with the change made to draft article 45.

10. **Mr. Mollmann** (Observer for Denmark) said that the reference to article 45 in paragraph 3 was no longer necessary and could, therefore, simply be deleted.

11. **Ms. Downing** (Australia), drawing attention to her delegation's written comments (A/CN.9/658, paras. 53-55), said that the Australian banking industry had pointed out that negotiable transport documents were often consigned to a bank without prior notice or

agreement. Under draft article 60, paragraph 2, the bank, acting as the consignee, might incur liabilities for contractual commitments, costs and so on. In the banking industry's view, such an approach was inconsistent with general principles and would create problems in the area of cost-recovery.

12. **Mr. Sato** (Japan) said that while draft article 60 would undoubtedly work well in some countries, it would create major difficulties for others, including Japan. In the worst case scenario, it could even prevent some countries from ratifying the convention. The Commission should therefore consider deleting if not the entire draft article then at least paragraph 2.

13. **Mr. Miller** (United States of America), **Mr. Mayer** (Switzerland), **Mr. Hu** Zhengliang (China) and **Mr. Sharma** (India) expressed support for the Danish proposal to delete the reference to article 45 in paragraph 3.

14. **Mr. Mayer** (Switzerland) also expressed support for the Japanese proposal to delete paragraph 2.

15. **Mr. Blake-Lawson** (United Kingdom) said that draft article 60 in its entirety should be deleted.

16. **Mr. van der Ziel** (Observer for the Netherlands) expressed support for the Danish proposal, but said that the rest of the draft article should be retained in its current form. Draft article 60 was of benefit to holders and banks. Under paragraph 1, a bank that took no action assumed no liability. He failed, therefore, to understand the Australian banking industry's concerns. Paragraph 2, meanwhile, simply reflected a general rule in respect of documents of title and confirmed that the rule applied to bills of lading, too.

17. **Mr. Berlingieri** (Italy) endorsed the proposals of both the Republic of Korea and Denmark. However, if, as the Republic of Korea proposed, the phrase "exercise(s) any right" was replaced by "demand(s) delivery of the goods" in paragraphs 1 and 2, paragraph 3 would no longer serve a purpose and could therefore be deleted in its entirety.

18. **Mr. Elsayed** (Egypt) expressed support for the Italian position.

19. **The Chairperson** said that if there was no objection, he would take it that the Commission wished to make the technical amendments proposed by the delegations of the Republic of Korea and Denmark.

20. **Mr. Mollmann** (Observer for Denmark) said that he would prefer to leave paragraphs 1 and 2 unchanged and simply to delete the reference to draft article 45.

21. **Mr. van der Ziel** (Netherlands), supported by **Mr.** Ibrahima Khalil **Diallo** (Senegal), objected to the Chairperson's statement that the amendment proposed by the representative of the Republic of Korea was of a purely technical nature. In the context of draft article 45, the consignee's exercise of its rights related solely to delivery of the goods; draft article 60, however, related not only to the consignee but to any holder and to the entire period of carriage. If the proposed amendment to paragraph 1 were made, a bank that exercised the right of control — as it might be forced to do if it held a pledge — might also have to assume any liability; the reference to draft article 57 had been included precisely in order to address that situation. In any event, he did not think that the Commission wished to dilute the meaning of paragraphs 1 and 2 by replacing "exercise(s) any right" by "demand(s) delivery of the goods".

22. He would prefer to leave paragraphs 1 and 2 in their current form; however, if the proposed changes were made, the representative of Italy was correct in stating that paragraph 3 would no longer be needed; the reference to article 57 in paragraph 1 could also be deleted.

23. **Mr. Miller** (United States of America) said that he agreed with the observer for the Netherlands; his delegation would prefer simply to delete the reference to draft article 45 as the Danish delegation had proposed.

24. **Mr. Berlingieri** (Italy) said he had thought that there was general agreement on the representative of the Republic of Korea's proposal. He agreed that the proposed amendments to paragraphs 1 and 2 would make paragraph 3 unnecessary; conversely, if that paragraph was retained, the proposed changes in paragraphs 1 and 2 should not be made.

25. **Mr. Sharma** (India) said that, while he supported the Danish delegation's proposal to delete the reference to draft article 45, he was not in favour of the amendments proposed by the delegation of the Republic of Korea. As the observer for the Netherlands had noted, draft articles 45 and 60 referred to different situations; in the latter case, the holder could be the controlling party, in which case its rights would not be restricted to the period of delivery.

26. **Mr. Kim** In Hyeon (Republic of Korea) said that he had not meant to make a formal proposal but had merely posed a question. After hearing the explanation given by the representative of the Netherlands, he thought that it would be sufficient to delete the reference to draft article 45 from paragraph 3.

27. **The Chairperson** said, he took it that the Commission wished to delete the reference to draft article 45 from paragraph 3.

28. *Draft article 60, as amended, was approved in substance and referred to the drafting group.*

Draft article 61 (Limits of liability)

29. **Ms. Hu** Shengtao (China) said that her Government attached great importance to the draft convention and would like to make it a workable legal instrument. However, China's shipping industry was of the view that the limits of liability established in the Hague-Visby Rules should be maintained. Her delegation had tried to demonstrate flexibility during the lengthy negotiations on draft article 61, but if the limits of liability were set higher than those in the Hamburg Rules, China would be unable to sign the draft convention.

30. **Mr. Delebecque** (France) said that his delegation fully supported the current text of the draft article, which represented an advance over the existing versions.

31. **Mr**. Ibrahima Khalil **Diallo** (Senegal) said that most of the African States were governed by legislation that was over a century old. They had made many concessions during the negotiations on the draft convention, yet the level of protection that it afforded shippers was still below that of the Hamburg Rules. While the text of draft article 61 was not perfect, it was part of a compromise package regarding the limitation on the carrier's liability (A/CN.9/WG.III/XXI/CRP.5) that had been negotiated during the twenty-first session of Working Group III (Transport Law), and the limits agreed at that time were reasonable. His delegation strongly supported the provision in its current form.

32. **Mr. Mbiah** (Observer for Ghana) said that, while the text of the draft convention was not set in stone, it represented a delicate balance that could not be changed without renegotiating a number of provisions of great concern to developing economies such as his own. The draft article should remain unchanged.

33. **Mr. Tsantzalos** (Greece), drawing attention to his delegation's written comments (A/C.9/658/Add.10, paras. 5-8), said that during the Working Group's deliberations, his delegation had expressed the view that liability limits should not be increased from the levels established in the Hague-Visby Rules, which were adequate to handle the vast majority of claims, as a counterbalance to the shift in the allocation of risk and liability towards the carrier in the draft convention. His delegation had been willing to take a positive approach to the initial compromise proposal for the adoption of maximum limits in line with those of the Hamburg Rules, combined with the deletion of other controversial provisions, as an overall package. However, it could not support the new proposal represented by draft article 61, which provided for limits even higher than under the Hamburg Rules. Another solution should be sought.

34. **Mr. Mollmann** (Observer for Denmark), speaking on behalf of **Ms. Slettenmoen** (Norway), who could not be present, said that the Norwegian delegation had endorsed the compromise package agreed in the Working Group and could not support any alternative proposals.

35. **Ms. Carlson** (United States of America) said that, although her delegation was not fully satisfied with the limits of liability established in the draft article, other delegations had shown flexibility on issues of great importance to the United States as part of the compromise package. She recognized that China's adherence to the draft convention, once adopted, would be vital to its success, but her own delegation supported the draft article in its current form.

36. **Mr. Elsayed** (Egypt) said that his delegation advocated leaving the text as it stood with one slight amendment in the second sentence of paragraph 3: instead of referring to the value of the currency "at the date of judgement or award", it would be fairer to make the value date the date that suit was filed or that arbitration proceedings were brought. There could be a considerable change in the value of a currency between the bringing of a claim and the pronouncement of a judgement or award, and the earlier date was closer to the date of the damage or loss.

37. **Mr. Schelin** (Observer for Sweden) said that the most important goal was to ensure that the greatest possible number of States could find the draft

convention satisfactory as a whole, so that it would be ratified by States representing a large percentage of world trade and transport in all regions. Only if its provisions represented a fair balance between the carrier's and the shipper's interests was there hope that the convention would come to form the global standard in maritime trade. The debate had shown that a number of delegations found some of the more important draft articles unsatisfactory, including those applying to land transport and those on the carrier's limits of liability, particularly the limitation amounts. His delegation believed that it was not too late to reach a compromise on those issues. Although he was well aware that the current provisions were the result of many years of negotiation and represented a delicate balance, it was possible that only minimal changes might make a broader consensus possible. His delegation wished to go on record as being willing to work out such a compromise together with other delegations.

38. With regard specifically to draft article 61, paragraph 1, Sweden proposed replacing the phrase "the carrier's liability for breaches of its obligations" with "the carrier's liability for loss resulting from loss of or damage to the goods as well as for loss resulting from misdelivery of the goods". Loss or damage to the goods and misdelivery represented the typical situations for which the carrier was liable and narrowed somewhat the scope of the carrier's obligations covered by the limitation amounts. Liability for loss from misinformation, for example, would not be limited. Considering that the shipper had no opportunity to limit its liability for misinformation, that struck a fairer balance.

39. **Mr. Hu** In Hyeon (Republic of Korea) recalled that in the Working Group his delegation had argued that the limits provided for under the Hague-Visby Rules, which the Republic of Korea had incorporated the previous year into its maritime law, were the appropriate ones. After lengthy consultations with industry, it had decided to maintain that position. Most of the East Asian countries were satisfied with the Hague-Visby limits. Even the shippers' associations did not feel the need for liability limits higher than those under the Hamburg Rules. Recent developments in packing had made it possible to increase the number of packages in a container; by declaring the full number of packages and paying a higher freight, a shipper could receive full compensation for loss. The draft convention's elimination of nautical fault as one of the carrier's defences would increase insurance premiums for the carrier in any case; Korean carriers were unwilling to accept higher liability limits as well. His delegation therefore continued to advocate the use of the Hague-Visby limits in draft article 61.

40. **Mr. Sandoval** (Chile) said that his delegation considered the limits set out in draft article 61, which were slightly higher than those under the Hamburg Rules, to be acceptable. Indeed, it would have wished the limits to be set even higher but had accepted the compromise in the hopes that it would enable the convention to bring about a unification of international transport law. He would urge delegations to support the current text.

41. **Mr. Berlingieri** (Italy) said that, since his delegation had participated in negotiating the limits of liability, it was committed to them.

42. **Ms. Peer** (Austria) said that her delegation supported the current limits of liability but was in favour of adopting the proposal of Sweden.

43. **Ms. Wakarima Karigithu** (Kenya) said that her delegation was strongly in favour of retaining draft article 61 in its current wording for the reasons expressed in particular by France, Ghana, Senegal and the United States of America.

The meeting was suspended at 4.40 p.m. and resumed at 5.05 p.m.

44. **Mr. Mollmann** (Observer for Denmark) said that as one of the sponsors of the compromise his delegation was saddened to hear that the limitation amounts were a cause of great concern to some delegations, including China and the Republic of Korea. The compromise had been agreed upon as a package, and it was important not to reopen single issues. What the delegation of Sweden had proposed as a minor adjustment was in fact a major change that would have a large impact on the draft convention.

45. **Mr. Egbadon** (Nigeria) stressed that the current text was the result of a complex compromise; the issue of limits could not be reopened without reopening all the other issues tied to the package. All regions of the globe should be taken into consideration, and many developing countries felt that the limits in draft article 61 should be retained. With regard to the Swedish proposal, his delegation was not in favour of redefining the carrier's breaches of obligation, since the current wording had also been part of the compromise.

46. **Ms. Czerwenka** (Germany) said that, despite arguments that the issue should not be reopened, it was the Commission's task to consider all aspects of the draft convention. She, too, was eager for the convention to enter into force throughout the world; it would be unfortunate if some regions were left out. Her delegation was willing to look into the question of limits and perhaps, without reopening all aspects, to help devise a package in which all concerns were reflected.

47. Her delegation also shared Sweden's concerns about the scope of the obligations of the carrier covered by the limits of liability and therefore supported the proposed change of wording. Many delegations had been concerned that a reference merely to loss and damage would be too narrow, and the current formula had therefore been devised, but the carrier's failure to supply information or indeed to provide the means of transport altogether had never been intended to be covered by the liability limits. A reference to misdelivery as well as loss and damage would clarify what had originally been intended by "breaches of its obligations"; the Swedish proposal therefore constituted a clarification, not a change of substance.

48. **Mr. Lebedev** (Russian Federation) said draft articles 18 and 61 were undoubtedly crucial to the draft convention. Leading experts in maritime law had been working on the draft for six years and some kind of output was essential. Of course, the convention, once adopted, would be heavily scrutinized. At that point there would be three international conventions in existence governing maritime trade, and it was not clear which of the three would be most widely applied.

49. While it would be difficult to go back and reconsider the liability limitation amounts, the Commission might reconsider the use of the phrase "breaches of its obligations under this Convention", a term not found in the Hague Rules or the Hamburg Rules, instead of the traditional "loss or damage to the goods". Paragraph 189 of the report of Working Group III (Transport Law) on the work of its twenty-first session (A/CN.9/645) indicated that there had been uncertainty about whether misinformation and misdelivery were or should be included. The term "breaches of its obligations" was vague and unclear, and guidelines would be required for courts and arbitration tribunals in applying the provision. If it were possible to revert to the original notion of loss or damage to the goods, it might be easier to reach consensus on the monetary amounts of liability.

50. **Mr Sharma** (India) said that the Working Group, after much effort, had produced a compromise text that struck a balance between those who wanted higher limits of liability and those who wanted lower limits. Consequently, although he was sympathetic to the concerns of China and the Republic of Korea, his delegation had accepted the compromise, in fact had proposed the current limits, and could not reverse its position. The Swedish proposal had merit. His delegation could not take a definitive position on it, since its hands were tied by the original agreement.

51. **Ms. Halde** (Canada) said that, not having been a party to the compromise agreement, her delegation would support Sweden's efforts to build a broader consensus. It also supported the proposed change to paragraph 1 for that reason.

52. **Mr. Sato** (Japan) said that his delegation had not been a sponsor of the compromise package in the Working Group, since it considered the limits too high, but it had ultimately supported the compromise. He was not optimistic about the emergence of any broader consensus on a new package, but would endorse such a consensus. If that effort failed, his delegation would stand by the current text of the draft article. Also, with regard to the Swedish proposal, the text of article 61 had been kept intentionally ambiguous. By specifically mentioning loss, damage and misdelivery, the Swedish proposal would, furthermore, affect the interpretation of article 18, making it clear that it did not cover misdelivery. That point, too, had been deliberately left ambiguous, because in some jurisdictions misdelivery was considered loss of the goods.

53. **Mr. Moulopo** (Observer for the Congo) said that article 61 was the result of a comprehensive compromise no part of which was subject to reconsideration. He therefore supported the text as it stood.

54. **Mr. Bigot** (Observer for Côte d'Ivoire) said that article 61 represented a single package reconciling divergent opinions on a number of issues, not just the limits of liability. Although his own delegation would have liked higher limits, support for the compromise text sent a strong signal of support for the principle of universality. His delegation was committed to the current text of draft article 61.

55. **Mr. Morán Bovio** (Spain) said that his delegation found draft article 61 fully acceptable in its current form. It had been an enormous task to reach consensus, and an agreement of that sort could not be improved upon.

56. **Ms. Mbeng** (Cameroon) said that her delegation had advocated higher limits but had agreed to the current text of draft article 61 in a spirit of compromise. The Swedish proposal represented a substantial change. Her delegation considered itself bound by the firm agreement that no aspect of the compromise package regarding the limitation on the carrier's liability would reopened.

57. **Mr. Ngoy Kasongo** (Observer for the Democratic Republic of the Congo), noting that some advances were historic and that the Commission had a chance to adopt the draft convention as a universal instrument, said that draft article 61 should be approved in its current form without reservation.

58. **Mr. Serrano Martínez** (Colombia) said that, even though his own country's law allowed higher limits of liability, his delegation supported the current text of draft article 61.

59. **Mr. Madariaga** (Honduras) said that one of the basic aims of the Commission was the harmonization of law. It had been agreed that the draft text would not be touched, and that commitment should be respected now.

60. **Mr. Luvambano** (Observer for Angola) said that the word "compromise" had an important legal definition. The text should be retained as drafted.

61. **Mr. Oyarzábal** (Observer for Argentina) said that the limits set in draft article 61 were 10 times lower than those his Government would have wanted, and it therefore could not accept any further reduction.

62. **Mr. Blake-Lawson** (United Kingdom), **Mr. Imorou** (Benin), **Ms. Lost-Sieminska** (Poland), **Mr. Ndzibe** (Gabon), **Mr. Hron** (Czech Republic), **Mr. Ousseimi** (Observer for the Niger) and **Ms. Traoré** (Observer for Burkina Faso) said that their delegations supported the compromise and wished to retain the current wording of draft article 61.

63. **Mr. Hu** Zhengliang (China) said, to clear up any misunderstanding of why his Government could not accept the limits of liability set in draft article 61, that the decision had been reached carefully, after consultation with China's cargo and shipping industries, which had unanimously maintained that, while the Hague-Visby Rules were acceptable, the limits set under the Hamburg Rules were higher than commercially necessary for the foreseeable future, and that to go above even the Hamburg Rules would harm maritime trade.

64. In the Working Group, China, as a political concession, had accepted the limits under the Hamburg Rules as the absolute maximum, but had never been given an explanation of why it was necessary to go any higher. The Commission, in going beyond what was necessary, had not been faithful to its principle of adopting rules of law that facilitated trade. The Commission's major political consideration should be to encourage the widest application of the convention to maritime trade, in terms of both trade volume and the number of contracting States. In World Trade Organization statistics, China ranked third in the world in the value of its international commodities trade and fourth in the size of its merchant fleet. As the largest developing country, China attached importance to harmonization of the law on the carriage of goods by sea, but its own fundamental national interest forced it to reject such high limits of liability.

65. **Mr.** Ibrahima Khalil **Diallo** (Senegal) asked China to take account of the will of the Commission. While China's needs were understandable, the rest of the world needed China, and it should try to reach an accommodation.

66. **Mr. Egbadon** (Nigeria) said that he understood the difficulty faced by China, the major trading partner of several African countries, but political considerations were also important, and he asked the Chinese delegation to reconsider before taking a final position.

67. **The Chairperson** said that it was clear that there was very broad support in the Commission for the current text of draft article 61.

68. *Draft article 61 was approved in substance and referred to the drafting group.*

Draft article 62 (Limits of liability for loss caused by delay)

69. **Mr. Oyarzábal** (Observer for Argentina) noted that the text set a limit of liability for economic loss due to delay equivalent to two and one-half times the

freight payable on the goods delayed, but since delay might damage the goods, that limit was not reasonable.

70. **Mr. Mbiah** (Observer for Ghana) said that he recalled that in earlier versions the Commission had done away with limits based on freight payable.

71. **Mr. Miller** (United States of America) clarified that the limit of liability based on freight payable did not relate to physical loss or damage to the goods due to delay, where the general limits in draft article 61 would apply, but only to non-physical, economic or consequential loss.

72. *Draft article 62 was approved in substance and referred to the drafting group.*

The meeting rose at 6 p.m.